Feb. 17, Postponed to Saturday next
Feb 24 - Adjd. immediately upon reaching this case

SUPREME COURT OF THE UNITED STATES.

No. 286.

G. CLARENCE CHURCHILL, IMPLEADED WITH EDWARD S. BRAYTON ET AL., PLAINTIFFS IN ERROR.

vs.

THE CITY OF UTICA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	3	1
Citation and service	4	2
Record of supreme court, New York	6	2
Judgment	20	11
Bond	24	13

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of New York, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, of a plea which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the City of Utica, plaintiff, and G. Clarence Churchill, impleaded with Edward S. Brayton, William D. Walcott, John J. Foote, and Morris S. Miller, trustee, &c., defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision
2 was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said G. Clarence Churchill, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-four.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

G. CLARENCE CHURCHILL,
Pl'ff in Error in person.

Allowed by— S. NELSON
Oct. 27, '65.

3 The answer of the judges of the court of appeals of the State of New York in the within writ named doth certify, under the seal of said court, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, and send the record whereof mention in said writ is made, with all things

touching or in anywise concerning the same, as appears in a certain schedule to this writ annexed as within it is commanded by the court.

[SEAL.] COR'S TEN BROECK, *Deputy Clerk.*

4 The United States of America to the City of Utica, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein G. Clarence Churchill is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 30th day of October, in the year of our Lord one thousand eight hundred and sixty-five.

S. NELSON.

5 STATE OF NEW YORK, *Oneida county, ss:*

On this 31st day of October, in the year of our Lord one thousand eight hundred and sixty-five, personally appeared Addison C. Miller before me, the subscriber, a notary public for the State of New York, duly authorized to administer oaths in the county aforesaid, and being by me duly sworn did make oath that he delivered a true copy of the within citation to John Butterfield, who is the mayor of the City of Utica, the def't in error named in the within citation, on the 31st day of October, A. D. 1865, at the city of Utica in said county, and left the same with him; and deponent further says that at the same time he exhibited to the said John Butterfield the foregoing original citation, and that he knew the person so served to be the mayor in fact of the said defendant in error.

ADDISON C. MILLER.

Sworn to and subscribed the 31st day of October, A. D. 1865, before me.

[SEAL.] G. R. THOMAS, *Notary Public.*

Supreme court.

6 THE CITY OF UTICA
against
G. CLARENCE CHURCHILL, EDWARD S. Brayton, William D. Walcott, John J. Foote, and Morris S. Miller, trustee, &c.

The parties to this action have agreed upon the following case, pursuant to section 372 of the Code of Procedure, containing the facts relative to the controversy depending between them, to wit:

First.—The Second National Bank of Utica is a banking corporation organized and doing business under and in pursuance of an act of the Senate and House of Representatives of the United States of America in Congress assembled, approved February 25th, 1863, entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," and the several acts of Congress additional and supplemental thereto and amendatory thereof.

Second.—That the certificate of incorporation of said bank was duly filed in the office of the Comptroller of the Currency, at the city of Washington, in the month of December, 1863.

Third.—That on the fourth day of January, 1864, the said Comptroller of the Currency issued and gave to said bank his official certificate, certifying, among other things, that said bank was authorized to commence the business of banking under the aforesaid act of Congress.

7 Fourth.—That the capital of said bank, on the first day of July, 1864, and at the time of making the assessment hereinafter mentioned, was the sum of two hundred thousand dollars, and that the said capital was divided into two thousand shares of one hundred dollars each, at the par value thereof.

Fifth.—That on the first day of July, 1864, and at the time of making the assessment hereinafter mentioned, the said defendant, G. Clarence Churchill, owned and was possessed of fifty shares of the capital stock of said bank, amounting at the par value thereof to the sum of five thousand dollars; the defendant, Edward S. Brayton, at the same time owned and was possessed of one hundred shares of the capital stock of said bank, amounting at the par value thereof to the sum of ten thousand dollars; the defendant, William D. Walcott, at the same time owned and was possessed of twenty-five shares of the capital stock of said bank, amounting at the par value thereof to the sum of two thousand five hundred dollars; the defendant, John J. Foote, at the same time owned and was possessed of thirty shares of the capital stock of said bank, amounting at the par value thereof to the sum of three thousand dollars; and the defendant, Morris S. Miller, trustee, &c., at the same time owned and was possessed of ten shares of the capital stock of said bank, amounting at the par value thereof to the sum of one thousand dollars; and the rest of the capital of said bank was owned and possessed by eighty-one different persons, residing in the various wards of the city of Utica and in various towns in the counties of Oneida, Herkimer, Madison, and Onondaga, and some out of the State of New York.

Sixth.—That the said bank, on the first day of July, 1864, and at the time of making the assessment hereinafter mentioned, was located in the first ward of the city of Utica; that the defendant, G. Clarance Churchill, resided in the first ward of the city of Utica at the time of making said assessment; the defendant, Edward S. Brayton, resided in the third ward of said city at the time of mak-

8 ing said assessment; the defendant William D. Walcott, resided in the town of Whitestown, in the county of Oneida, at

the time of making said assessment; the defendant, John J. Foote, resided in the town of Hamilton, in the county of Madison, at the time of making said assessment; and the defendant, Morris S. Miller, resided in the city of Washington, D. C., at the time of making said assessment.

Seventh.—That none of said defendants have any goods or chattels subject to levy in said first ward, except the defendant, G. Clarence Churchill.

Eighth.—That in pursuance of the charter of said city of Utica, entitled "An act to revise the charter of the city of Utica," passed February 28th, 1862, which act is made a part of this case, one assessor is elected for each ward of said city, and that said city by said charter is divided into seven wards.

Ninth.—That on the first day of July, 1864, and at the time of making the assessment hereinafter mentioned, the entire capital of said bank was invested in the bonds, stocks, or securities made and issued by the United States government, and which were made and issued prior to the first day of June, 1864.

Tenth.—That of the capital of said bank one hundred and sixty-six thousand dollars thereof were, on the first day of July, 1864, and at the time of making the said assessment, invested in United States bonds, commonly known and called "five-twenty bonds," which bonds were issued in pursuance of an act of Congress, approved Feb'y 25th, 1862, and entitled "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," and the rest of the capital of said bank, viz., the sum of thirty-four thousand dollars thereof, was invested in United States bonds, commonly called and known as "ten-forty bonds," which last-named bonds were issued in pursuance of an act of Congress, approved March 3d, 1864, and entitled "An act supplementary to an act to provide ways and means for the
9 support of the government, approved March 3d, 1863."

Eleventh.—That the assessor of the first ward, and the assessors of the several wards, respectively and collectively, of the said city of Utica, in making out the assessment roll for the said first ward of the city of Utica for the year 1864, first set down and included in the assessment roll for said first ward an alphabetical list of all persons and corporations liable to be assessed in said first ward for real and personal estate, and assessed to such persons and corporations the real and personal estate for which they were liable to be assessed, following which, and in continuance of said roll, there was inserted in said assessment roll for said first ward, as follows:

Names and residences of the stockholders of the Second National Bank of Utica, on the first Monday of July, 1864.

Ackley, Rodney	$1,000
Allen, Benjamin, Utica	3,000
Avery, Eli, Clinton	2,000
Avery, Mrs. M. D., Clinton	1,000
Brayton, E. S., Utica	10,000

	Bacon, Wm. J. ... "	$2,500
	Butterfield, John "	5,000
	Boyce, A. H. ... "	1,000
	Bennett, Willard S., Oneida	5,000
	Barnard, C. E., Utica	1,000
	Bacon, Ez. ... "	2,500
	Berney, Mary L., Hamilton	2,000
	Broadwell, Henry	500
	Broadwell, Wm.	500
	Birdsell, Thomas	500
	Beach, Wm. S.	1,000
	Bebee, A. M.	300
	Bebee, Mrs. C. I.	200
	Bailey, Joel C., Utica	1,000
	Blue, Arch., North Gage	1,000
	Broadhead, James, Chittenango	5,000
	Churchill, Alfred, Utica	5,000
	Churchill, G. C. ... "	5,000
	Crill, Daniel, Steuben	5,000
	Combs, Orville	6,000
	Crouse, Daniel, Utica	2,000
	Coventry, C. B. ... "	1,000
	Curtis, Isaac	1,500
	Chapman, B. F., Clockville	1,000
	Crouse, John, Syracuse	1,000
	Campbell, Samuel, New York Mills	2,500
	Dubois, George, Utica	1,000
	Douglas, Mrs. Sarah	600
	Faxton, T. S., Utica	10,000
	Foote, John J., Hamilton	3,000
	Foote, Edward W.	1,000
	Farman, Henry, Knoxboro	300
	Foote, Mrs. M. C.	200
	Foote, John	1,000
10	Foote, J. J., guardian	1,000
	Gardner, Morgan, Utica	5,000
	Gardner, Jas. V. P., Utica	10,000
	Gardner, Sarah J., Utica	500
	Hamlin, Wm. D	5,000
	Howard, Mrs. Mary P	1,000
	Hascall, Mrs. Angeline	500
	Herbage, Mrs. Janette	1,600
	Herbage, Wm	4,800
	Hartshorn, Mrs. E	600
	Hovey, Isaac, Deansville	8,000
	Jewett, B. F., Utica	3,000
	James, E. H., Utica	300
	Lawrence, L. H., Utica	2,000
	Lawrence, Lewis, Utica	1,500

Middleton, Robert, Utica	$5,000
Mills, Charles D., Albany	5,000
McCall, John, Utica	1,000
Miller, Ichabod R., New Hartford	5,000
Miller, Morris S., trustee, Washington	1,000
Northrup, D. W., Utica	800
Priest, Z. C., Little Falls	5,000
Pratt, Wm., Utica	2,000
Powell, Miss M. H., Utica	500
Powell, Liberty, Whitesboro	1,000
Potter, Miss L	500
Paddock, Samuel, Sauquoit	1,200
Roberts, Henry, Utica	5,000
Russell, Wells C	1,000
Roberts, Hector W	1,400
Seeber, Sylvanus, Clockville	1,000
Skidmore, Miss H. M., Utica	600
Stuart, Daniel, Chittenango	1,000
Stuart, Robert, Chittenango	1,000
Stillman, E., Hamilton	500
Shorts, D. W., Madison	1,800
Thomas, Geo. R., Utica	2,000
Tallman, Geo. C., Utica	1,500
Timerman, D., Utica	3,000
Thomas, M. H., Utica	2,500
Walcott, Wm. D., New York Mills	2,500
White, Philo, Whitesboro	500
Westcott, George, Utica	5,000
Watson, Wm. R., New York Mills	500
Watson, Mrs. Wm. R., New York Mills	1,800
Wood, F. G., Utica	500
Walker, Alfred, Utica	1,000

Twelfth.—That said assessment is intended to be and was in fact an assessment against the several stockholders in said bank upon the several shares and interests of stock held by said stockholders, respectively, in the capital stock of said bank, to the amount of the par value thereof.

Thirteenth.—That the common council of the city of Utica, on or about the twenty-sixth day of September, 1864, imposed upon the persons and property assessed in the several assessment rolls of all the wards of said city the amount of taxes for city purposes authorized by said council to be raised, under the provisions of the charter of said city and the laws of this State, for the year 1864; and that in so doing the said common council have imposed upon all the said stockholders, respectively, in said bank, at the time of mak-
11 ing said assessment, the city taxes for said city of Utica, for the year 1864, to the same extent and amount as though said stockholders were legally liable to be assessed and taxed upon their said several shares of stock in said bank in the first ward of the city

of Utica, for the purposes of said city; and did impose a tax against the defendant, G. Clarence Churchill, upon his said shares of stock in said bank, in the first ward of said city, to the amount of $67 15; and did impose a tax against the defendant, Edward S. Brayton, upon his said shares of stock in said bank, in the first ward of said city, for the purposes of said city, to the amount of $134 30; and did impose a tax against the said defendant, William D. Walcott, upon his said shares of stock in said bank, in the first ward of the said city, for the purposes of said city, to the amount of $33 57; and did in like manner impose a tax against the said defendant, John J. Foote, upon his said shares of stock in said bank, in the first ward of said city, for the purposes of said city, to the amount of $40 29; and did impose a tax against the defendant, Morris S. Miller, trustee, &c., upon his said shares of stock in said bank, in the first ward of said city, for the purposes of said city, to the amount of $13 43.

Fourteenth.—That on the fourth day of November, 1864, the treasurer of the city of Utica delivered the tax lists of said first ward to the collector of said first ward of said city, with a warrant under his hand thereto annexed, directing and requiring the said collector, among other things, to collect the taxes so imposed as aforesaid upon the defendants above named.

Fifteenth.—That said collector has duly returned said tax list, and the taxes so imposed as aforesaid against the defendants above named, to said treasurer wholly uncollected, and that said taxes so imposed against said defendants do now remain wholly unpaid.

Sixteenth.—That said stockholders and defendants are not assessed for and upon said shares and interests, respectively, in said capital stock of said bank at any other place or in any other manner or form than as is herein particularly set forth.

12 Seventeenth.—That the following was, on the ninth day of July, 1864, issued by the comptroller of the State of New York, and published in the official State paper of that date :

"STATE OF NEW YORK,
"*Comptroller's Office, Albany, July* 9.

"In reply to numerous inquiries from assessors, the comptroller takes this mode of giving the information asked for.

"1. No person can be taxed for stocks of the United States held by him.

"2. The State banks are to be taxed for the full amount of their capital, without regard to the nature of the securities in which it may be invested. No deductions can be made from the capital for United States stocks held by such banks.

"3. The capital of the national banks cannot be taxed, but each stockholder in such bank is to be taxed for the amount of his stock as so much personal property at the place where the bank is located. Each bank is required by law to keep a correct list of its stockholders, with the amount of stock held by them, respectively, and to exhibit the same to any assessor when requested so to do.

"LUCIUS ROBINSON, *Comptroller.*"

Eighteenth.—That the aggregate assessment of personal property of the county of Oneida, for the year 1864, does not exceed the sum of two hundred thousand dollars.

Nineteenth.—That the purpose of this submission is to determine the rights of parties hereto, as to each defendant severally, and all objections on the ground of misjoinder of defendants, or of jurisdiction to the court, is hereby expressly waived.

I. C. McINTOSH. *Att'y for Pl'ff.*
EDMONDS & MILLER, *Defendant's Attorneys.*

13 Supreme court.

THE CITY OF UTICA
against
G. CLARENCE CHURCHILL AND OTHERS.

ONEIDA COUNTY, *ss:*

Ichabod C. McIntosh, of Utica, in said county, being duly sworn, says that he is the city attorney for the city of Utica, and the attorney for the plaintiff named in the above action. That a controversy really exists between the parties to this action, the facts of which are substantially set forth in the foregoing statement of facts and submission. That said submission is entered into in good faith, to determine the rights of all the parties to said action; and further says not.

I. C. McINTOSH.

Sworn to before me this 22d day of December, 1864.
WM. J. BACON.

Supreme court.

THE CITY OF UTICA
agst.
G. CLARENCE CHURCHILL AND OTHERS.

It is hereby stipulated that costs in the judgment rendered herein and hereto annexed be adjusted and entered in judgment at seventy-five $\frac{50}{100}$ dollars, respectively, for each party.

E. B. HASTINGS,
Att'y for the Pl'ff.
EDMONDS & MILLER,
Att'y for Def't.

14 Supreme court.

THE CITY OF UTICA
ag'st
G. CLARENCE CHURCHILL, EDWARD S. BRAYton, William D. Walcott, John J. Foote, and Morris S. Miller, trustee, &c.

It is hereby stipulated that Eugene B. Hastings be substituted as att'y for the pl'ff in above-entitled action, in the place and stead of

I. C. McIntosh, the present att'y for the pl'ff, and that an order to that effect may be entered in Oneida county clerk's office. Dated Utica, March 15, 1865.

J. C. McINTOSH, *Att'y for Pl'ff.*
EDMONDS & MILLER, *Att'ys for Def't.*

Supreme court.

THE CITY OF UTICA
ag'st
G. CLARENCE CHURCHILL, EDWARD S. BRAYton, William D. Walcott, John J. Foote, and Morris Miller, trustee, &c.

On reading and filing stipulation of attorneys for respective parties in above-entitled action, it is hereby ordered that E. B. Hastings be and he hereby is substituted as the attorney for the pl'ff in above-entitled action.

Dated, Utica, March 15, 1865.

15 At a general term of the supreme court held at the court-house in the city of Syracuse, in and for the fifth judicial district, State of New York, on the 6th day of April, 1865—

Present: Hon. Joseph Mullin, Le Roy Morgan, Wm. J. Bacon, and Henry A. Foster, justices supreme court; I. C. McIntosh, (Bacon did not sit in this case;) Edmonds & Miller.

THE CITY OF UTICA
vs.
G. CLARENCE CHURCHILL, &c.

Judgment for def'ts, except Churchill, with costs, and for plaintiff, against Churchill, with costs.

Opinion by Mullin.

A copy. CARROLL E. SMITH, *Clerk.*

THE CITY OF UTICA
ag'st
G. CLARENCE CHURCHILL, EDWARD S. BRAYton, William D. Walcott, John J. Foot, and Morris S. Miller, trustee, &c.

16 This action having been brought to an hearing, on submission of the parties in the first instance, at a general term of the supreme court held at the court-house in the city of Syracuse, in and for the fifth judicial district, State of New York, on the 3d day of January, 1865, and all of the proceedings herein having been taken in pursuance of the provisions of chap. 1, title XII, of an "Act to simplify and abridge the practice, pleadings, and proceedings of the courts of this State" known as the "Code of Procedure," and the decision of the court upon such hearing having been filed, whereby it is ordered and adjudged that plaintiff recover judgment against defendant, Churchill, with costs, and that other def'ts, except Churchill, recover payment ag'st pl'ff, with costs:

Now, on motion of Edmonds & Miller, att'ys for def'ts, it is adjudged that the said pl'ff, the City of Utica, recover of the def't, G. Clarence Churchill, the sum of sixty-nine dollars seventy-six cents damages and interest, and seventy-five dollars and fifty cents costs and disbursements, amounting in the whole to $145 26, and that the defendants, Edward S. Brayton, William D. Walcott, John J. Foote and Morris S. Miller, trustee, &c., recover of the plaintiff seventy-five dollars and fifty cents, being their costs and disbursements.

O. CARPENTER, *Clerk.*

Judgment entered May 26, 1865, 5½ p. m.

17 Supreme court.

THE CITY OF UTICA
ag'st
G. CLARENCE CHURCHILL, EDWARD S. BRAYTON, WILLIAM D. WALCOTT, JOHN J. FOOTE, and MORRIS S. MILLER, trustee, &c.

GENTLEMEN: Please take notice that the defendant, G. Clarence Churchill, appeals to the court of appeals from so much of the judgment perfected in this action on the 26th day of May, 1865, as affects or relates to the said defendant, Churchill. Dated May 26, 1865.

Yours, &c.,
EDMONDS & MILLER, *Att'ys for Def't.*

To the CLERK OF ONEIDA COUNTY, and to
E. B. HASTINGS, *Att'y for Pl'ff.*

Personal service of a copy of the above notice hereby admitted this 26th day of May, 1865.

E. B. HASTINGS, *Att'y for Pl'ff.*

Filed May 26, 1865.

18 Supreme court.

THE CITY OF UTICA
ag'st
G. CLARENCE CHURCHILL, EDWARD S. BRAYTON, WM. D. WALCOTT, JOHN J. FOOTE, and MORRIS S. MILLER, trustee, &c.

To Edmonds & Miller, esq's, att'ys for def'ts, and to Orson Carpenter, esq., clerk of the county of Oneida:

Please take notice that the plaintiff in above-entitled action appeals to the court of appeals from the judgment entered in this action on the 26th day of May, 1865, in Oneida county clerk's office, so far as said judgment relates to the def'ts, Edward S. Brayton, William D. Walcott, John J. Foote, and Morris S. Miller, trustee, &c. Dated May 26, 1865.

Yours, &c.,
E. B. HASTINGS,
Att'y for the City of Utica.

Personal service of a copy of the above notice hereby admitted this 26th day of May, 1865.

EDMONDS & MILLER, *Att'ys for Def'ts.*

Filed May 26, 1865.

19 ONEIDA COUNTY, *Clerk's Office, ss:*

I certify that I have compared the foregoing copies of notices of appeal and judgment roll with the original thereof on file in this office, and that the same are correct transcripts therefrom, and of the whole of such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county this 16th day of June, 1865.

[L. S.] O. CARPENTER, *Clerk.*

20 Court of appeals.

THE CITY OF UTICA, appellant and respondent, *agst.* G. CLARENCE CHURCHILL, appellant, and Edward S. Brayton, William D. Walcott, John J. Foote, and Morris S. Miller, trustee, &c., respondents.

The appeal in this cause having been argued by Mr. Francis Kernan, of counsel for the plaintiff, and by Mr. Addison C. Miller, of counsel for the defendants, and due deliberation having been had thereon, it is ordered that the judgment of the supreme court appealed from be, and the same is hereby, in all respects affirmed, with costs of this appeal to the City of Utica, as against the defendant, Churchill, and with costs to the defendants, Edward S. Brayton, William D. Walcott, John J. Foote, and Morris S. Miller, trustee, &c., as against the plaintiff, "The City of Utica."

And the defendant, G. Clarence Churchill, having claimed exemption from the taxation mentioned in the record in this cause under and by virtue of the 8th section of article 1 of the Constitution
21 of the United States; and also under and by virtue of the 2d section of the act of Congress entitled "An act to authorize the issue of United States notes and for the redemption or funding thereof, and for funding the floating debt of the United States," approved Feb'y 25, 1862; and also under and by virtue of an act of Congress entitled "An act supplementary to an act entitled An act to provide ways and means for the support of the government," approved March 3d, 1863; and also by virtue of the provisions of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved Feb'y 25, 1863, and the several acts of Congress additional and supplemental thereto and amendatory thereof—on the ground that the entire amount of the capital stock of said bank, in that respect mentioned in said record, is invested in the public debt of the United States; also on the ground that said
22 tax is prohibited by said section 8, article 1, of the Constitution of

the United States; also on the ground that said tax is prohibited by the provisions of the several acts of Congress before mentioned; also on the ground that said tax is prohibited by the Constitution and the laws of the United States. And the validity of the authority claimed by said plaintiff under chap. 13, part 1, title 1, of the revised statutes of New York, and under the provisions of an act of the legislature of the State of New York entitled "An act to revise the charter of the city of Utica," passed Feb'y 28, 1862, to impose the tax mentioned in said record, being drawn in question, it is certified that the judgment of this court is against the said defendant, G. Clarence Churchill, and is against the exemption, right, privilege, or exception claimed by him under and by virtue of said provisions of the Constitution of the United States and the several acts of Congress before referred to, and in favor of the validity of the authority of such statutes of
23 New York State. And the construction of 8th section of article 1 of the Constitution of the United States, and of the several acts of Congress before mentioned, being drawn in question, it is further certified that the judgment of this court is against the right, privilege, exception, or exemption specially claimed by said defendant, Churchill, under said section of the Constitution of the United States and the several acts of Congress before mentioned.

A copy. COR'S TEN BROECK, *Dep. Clerk.*

24 Know all men by these presents, that we, G. Clarence Churchill and John H. Edmonds, of the the city of Utica, N. Y., are held and firmly bound unto the city of Utica in the full and just sum of one thousand dollars, to be paid to the said city of Utica, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of October, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas lately, at a court of appeals of the State of New York, in a suit depending in said court between the City of Utica, plaintiff, and G. Clarence Churchill, impleaded with Edward S. Brayton, William D. Walcott, John J. Foote, and Morris S. Miller, trustee, &c., judgment was rendered against the said G. Clarence Churchill; and the said Clarence Churchill having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Utica, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of next December:

Now, the condition of the above obligation is such that, if said G. Clarence Churchill shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

G. CLARENCE CHURCHILL. [SEAL.]
JOHN H. EDMONDS. [SEAL.]

Sealed and delivered in presence of—

Approved by— S. NELSON.
Oct. 27, 1865.

25 STATE OF NEW YORK, *Oneida county, ss* :

On this 25th day of October, A. D. 1865, before me came G. Clarence Churchill and John H. Edmonds, known to me to be the same individuals described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same for the use and purpose therein mentioned and expressed.

[L. s.] G. R. THOMAS,
Notary Public, Utica, N. Y.

STATE OF NEW YORK, *Oneida county, ss :*

G. Clarence Churchill and John H. Edmonds, being duly and severally sworn, do depose and say, and each for himself says, that he is a resident and freeholder of the city of Utica, in said county, and he is worth the sum of two thousand dollars over and above all his debts, liabilities, and responsibilities, and besides his property exempt from execution.

G. CLARENCE CHURCHILL.
JOHN H. EDMONDS.

Subscribed and sworn before me this 25th day of October, 1865.

[L. s.] G. R. THOMAS, *Notary Public, Utica, N. Y.*

Filed November 6, 1865.

REC. 286—3

[Every law, unless a different time shall be prescribed therein, shall commence and take effect throughout the State, on and not before the twentieth day after the day of its final passage as certified by the Secretary of State. Sec. 12, title 4, chap. 7, part 1, Revised Statutes.]

[Every law so published in the State Paper, may be read in evidence from the paper in which it shall be contained, in all the courts of justice in this state, and in all proceedings before any officer, body or board, in which it shall be thought necessary to refer thereto until three months after the close of the session in which it became a law. Sec. 8, title 7, chap. 8, part 1, Revised Statutes and Laws of 1845, chap. 280.]

CHAP. 97.

AN ACT enabling the banks of this State to become associations for the purpose of banking under the laws of the United States.

Passed March 9, 1865.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The assent of the legislature is hereby given to the organization of associations for carrying on the business of banking within this state, pursuant to the provisions of the act of Congress "To provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved June, eighteen hundred and sixty-four; and the provisions of chapter twenty, article three, part first of the Revised Statutes, entitled "Of unauthorized banking," &c., shall not apply to the associations formed under or the notes issued in accordance with the act of congress aforesaid. And the provisions of this act shall be taken and deemed as an amendment of the laws of this state in reference to the business of banking. And every bank organized pursuant to the act of congress aforesaid within this state, and every bank organized under said act in pursuance of this act, shall be deemed and held to be a banking institution for all financial transactions of the government of this state, and any and all officers thereof, the same as if organized under and in pursuance of the general banking laws of this state.

§ 2. Any bank incorporated or organized by authority of this state, which shall become an association for carrying on the business of banking under the laws of the United States, shall be deemed to have surrendered its charter, if it shall have complied with the requirements of this act; provided, that every such bank shall nevertheless be continued a body corporate for the term of three years after the time of such surrender, for the purpose of prosecuting and defending suits by and against it, and of enabling it to close its concerns, and to dispose of and convey its property; but not for the purpose of continuing under the laws of this state the business for which it was established.

§ 3. When a bank, at a meeting of the stockholders, has voted, by two-thirds its number of shares, to become such association, or its directors have procured in writing the authority of the owners of two-thirds of its capital stock, to make the certificate required therefor by the laws of the United States, or shall, by a vote of the majority of the directors, have decided to make the change authorized in the discretion of such directors, such bank shall be deemed to have decided to become a banking association under the laws of the United States; and the cashier shall publish notice thereof for thirty days in such newspaper as the directors may select and send like printed notice by mail or otherwise to all non-voting or dissenting stockholders, and shall also notify the superintendent of the banking department of this state that said bank has decided to become a banking association under the laws of the United States.

§ 4. In case of a meeting of the stockholders of any such bank as aforesaid, each stockholder shall be allowed to cast one vote for every share of such capital so held by him or her, and may vote by proxy; and any executor, administrator or trustee holding any such share may vote personally or by proxy, without incurring any personal responsibility by said vote.

§ 5. When the charter of any bank is surrendered under the provisions of this act, the members of the board of directors last in office shall continue to be the board of directors of the new association to be formed under the laws of the United States, with power to take all necessary measures to carry out and perfect such organization, by signing the articles of association and the organizing certificate, and adopting such regulations as may be deemed just and proper, and not inconsistent with the act of congress in relation thereto. They may reduce the capital stock of said bank to its par value, by dividing the surplus among its stockholders, or may retain such portion of such surplus as they may deem necessary; and in case of an increase of the capital stock, under the provisions of the act of congress, may charge the shares of such increased capital stock with a like amount, to

place the whole of such capital stock on an equality; and may award such new stock, or such proportion or fractional parts thereof, to such persons as they shall determine are entitled thereto as provided in their articles of association and in the act of congress passed in relation thereto; provided, however, that new directors may be chosen at such time and in the manner provided in the articles of association and the act of congress aforesaid.

§ 6. When any bank has decided to become a banking association under the laws of the United States, it shall be the duty of the directors immediately thereafter to proceed to execute and transmit to the comptroller of the currency the proper certificates and other instruments for its conversion into a national banking association under the laws of the United States; and as soon thereafter as any such bank shall obtain the certificate of the comptroller of the currency authorizing it to commence the business of banking under the laws of the United States, all the assets, real and personal, of the said bank, shall immediately, by act of law, and without any conveyance or transfer, be vested in and become the property of the national banking association into which said bank shall have been converted; and it shall be entitled, on returning the bills of such bank to the banking department of this state, to receive the stocks pledged to secure the redemption of the same, in the like manner as the bank issuing the same is now entitled by law; and shall be subjected to the same rules as state banks in respect to the final redemption of the circulating notes of such state banks so converted into national associations.

§ 7. The plates and dies of any bank so converted into a national association, and now in the banking department of this state, shall be forthwith so obliterated as to prevent all future use of the same, as provided by section five, chapter one hundred and eighty-nine of the laws of eighteen hundred and fifty-seven; and any use of them in the manufacture of notes or bills shall be punished as a misdemeanor, on conviction, by court having cognizance thereof.

§ 8. Nothing in this act shall be construed as releasing such association from its obligations to pay and discharge all the liabilities created by law or incurred by the bank before becoming such association, or any tax imposed by the laws of this state up to the date of its becoming such association, in proportion to the time since the next preceding payment therefor.

§ 9. Any state bank which has, before the passage of this act, become a national association, by complying with the provisions of the act of congress in relation thereto, shall be entitled to all the benefits and subject to the provisions of this act, the same as if such conversion had been made after the passage of the same; and may amend or supply any imperfect paper, act or proceeding heretofore taken or omitted, so as to conform the same with the provisions of this act, without invalidating its conversion from a state to a national association heretofore made.

§ 10. All the shares in any of the said banking associations, organized under this act, or the act of congress mentioned in section one of this act, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation, in the assessment of taxes in the town or ward where such banking association is located and not elsewhere, whether the holder thereof reside in such town or ward or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this state; provided that the tax so imposed upon such shares shall not exceed the par value thereof; and provided further, that the real estate of such associations shall be subject to state, county or municipal taxes to the same extent according to the value, as other real estate is taxed.

§ 11. For the purpose of collecting such taxes and in addition to any other law of this state, not in conflict with the federal Constitution, relative to the payment, imposition or collection of taxes, it is hereby enacted and declared that it shall be the duty of every banking association organized or to be organized as aforesaid, to retain so much of any dividend or dividends belonging to any shareholder as shall be necessary to pay any taxes hereby authorized, unless it shall be made to appear to such banking association that such taxes have been paid.

§ 12. This act shall take effect immediately.

STATE OF NEW YORK,
Office of the Secretary of State, } ss.

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

CHAUNCEY M. DEPEW,
Secretary of State.

SUPREME COURT OF THE UNITED STATES.

No. 286.

G. CLARENCE CHURCHILL, Impleaded with others,
Plaintiff in Error,

vs.

THE CITY OF UTICA, *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OF CASE.

The plaintiff in error is a stockholder in the Second National Bank of Utica. The questions involved were brought to a hearing in the first instance at a General Term of the Supreme Court, in the Fifth Judicial District of New York, upon a case submitted in pursuance of the 372d section of the Code. The real controversy being, whether or not the stockholders of National Banks are liable to State taxation upon their shares of stock.

The Bank is situated in the First Ward of the city of Utica, and the several stockholders were assessed in said Ward, whether residing therein or elsewhere.

For the purpose of meeting every possible question, various stockholders were selected for defendants, having regard to their several places of residence.

At the time of making the assessment, the defendant Churchill resided in said First Ward. The other defendants resided without the ward in which the Bank was located. The entire capital of the Bank was invested in United States securities. (fol. 8.)

The cause was argued at the January General Term, 1865; and at April Term, 1865, judgment was rendered in favor of all the defendants except Churchill, and in favor of the plaintiff against Churchill, who resided in the same Ward in which the Bank was located. The assessment as to the defendants who resided out of the Ward in which the Bank was located was held illegal under the statute of New York, (1 *R. S.* 389, § 5,) which requires that every person shall be assessed in the Town or Ward where he resides when the assessment is made, for all personal estate owned by him; and as the defendant Churchill resided in the Ward in which the Bank was located, the case was freed of that objection as to him, and judgment was given against him, and as to which judgment he appealed to the Court of Appeals. The plaintiff also appealed as to the judgment in favor of the other defendants. The cause was argued at the September term (1865) of the Court of Appeals, and judgment at the same term was rendered, affirming the judgment of the Court below in all things. From the judgment of the Court of Appeals, the defendant Churchill brings error to this Court. The opinion of the Supreme Court of the State in this case, is reported in 43 *Barb.* 550.

By the judgment rendered the rule is established, until that judgment is reversed: That the State possesses the uncontrolled and unlimited power to impose taxes for State purposes against the stockholders of National Banks upon their shares of stock held in those institutions, without regard to the manner in which the capital of such banks may be invested, whether in the National securities or otherwise.

On the part of the plaintiff in error, we assert that the States do not possess any sovereign jurisdiction whatever

over this class of banks or their stockholders as such; that the right of the States to tax these banks, or their stockholders upon their shares of stock, is denied by the provisions of the Constitution of the Federal Government.

ARGUMENT.

We understand it to have been settled by the Supreme Court of the United States, in several well considered cases:

1. That the Stock of the Federal Government is not subject to taxation under the laws of a State.

2. That a State law for that purpose is unconstitutional, whether it imposes the tax on United States stocks, *eo nomine*, or includes it in the tax-payers' property, to be valued, like the rest, at its worth.

3. That a State tax on the loans of the General Government, is a restriction upon the constitutional power of Congress to borrow money; and if the States had such a right, being in its nature unlimited, it might be so used as to defeat the Federal power altogether.

4. That a State cannot impose a State tax upon any of the means properly employed by Congress to execute any of the great powers granted to the General Government by the Federal Constitution.

5. That if the right of State taxation be admitted in any one instance, it must be extended to all, and the States

would have a right to impose a tax upon the Federal Judiciary, the Post Office, the Custom House, the Patent Office, the Mint, the Army, the Navy, or any of the means employed to carry on the affairs of the General Government; and might go to the extent of breaking down any or all of these great powers, and thus destroy the Government.

McCullough vs. The State of Maryland, 4 Wheat. 316.
Osborn vs. U. S. Bank, 9 Wheat. 738.
Weston vs. The City of Charleston, 2 Peters, 449.
Bank of Commerce vs. Commissioners, &c., 2 Black. 620.
The People, &c., vs. The Commissioners, &c., 2 Wall. 200.

As we proceed with our argument, we shall show that the principles established by the preceding cases, are applicable to the case before us, and that this is only another instance of what we so often see in life—a recurrence of the same ideas, the same scenes, the same political questions, all to be gone over again and determined anew.

That this class of property should escape taxation altogether, very naturally strikes one as an absurdity, and we do not argue in favor of any such proposition. It is thought and believed, that this Bank or its stockholders can and should, at the proper time, be reached for the purpose of taxation. And not only that, but that they should and will be taxed to the full extent that they can bear taxation, and yet remain useful institutions to the country. But it will be asked, if they are to be taxed, by whom are they to be taxed, except by the States? We reply, by the National Government. By the power which is responsible for their success, or non-success, as banking institutions. By the power which brought them into being, and by whose authority they continue to exist. The history of all legislation will show that these Banks cannot exist any length of time, if this right of taxation in the States is to be upheld. Suppose the State of New York had the right to create a bank, and locate it for doing business, in the State of Ohio, with the right of that State to tax it or its stockholders: how long, can it be sup-

posed, that such a bank could exist? Again, suppose that the people of the State of New York were liable to be taxed by the State of Ohio: would we not be ground down by oppressive and unjust taxation? It is submitted, that this power of taxation must remain, as it always has been, a sovereign power, and to be exercised only over such property as the sovereignty of the State may extend. That the National institutions and National establishments of every kind, which have been brought into existence by laws constitutionally enacted by the National Legislature, exist independently of the State governments, and cannot be made tributary, by means of State laws for taxation, or in any other manner, to the needs or exigencies of the State governments.

POINTS.

I. The case cannot be distinguished, upon principle, from the cases which have passed upon review the judgment of this court.

The case of McCullough occurred in 1819. The State of Maryland placed a stamp tax upon the notes of the Branch Bank of the United States, located in Baltimore; and it was held that the Bank was a means employed by the Federal Government for fiscal purposes, and if the right to impose such a tax were once admitted, the State could tax the Bank to such an extent that it could not issue any notes whatever. That it was a tax upon the power of Congress to borrow money, and was repugnant to the Federal Constitution, and therefore void.

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The case of Osborn occurred in 1824. The State of Ohio imposed an annual tax of $50,000 upon the United States Bank, for each office of deposit and discount within the State. And the tax was held to be illegal, upon the same reasoning and principle of the Maryland case.

The case of Weston occurred in 1829. The city of Charleston passed an ordinance to raise supplies for the use of the city. The ordinance imposed a tax upon "All personal estate, consisting of bonds, notes, insurance stock, *six and seven per cent. stock of the United States*, &c. A prohibition was issued to prevent the collection of the tax, and it was sustained by the Court; and the proposition, in its broadest sense, was established, that *the taxing power of a State does not extend to stocks issued by the Federal Government.*

The case of the Bank of Commerce was before this Court in December, 1863. The Bank was organized under the General Banking Act of New York, and had a large portion of its capital invested in United States stocks; and it was held that the Bank was entitled to a deduction upon its assessed valuation to the amount of Government stocks held by it; and that by constitutional provision, and not by mere act of Congress. And the principles of the former cases were reaffirmed and asserted.

The case of the *People vs. Commissioners*, &c., was before this Court in January, 1865. The Legislature of New York, by *Chap.* 240, *Laws* 1863, provided, in substance, that banks shall be liable to taxation, *on a valuation equal to the amount of their capital stock, paid in or secured to be paid in*, deducting the value of real estate. Held, this tax was in substance a tax

upon the property in which the capital of the bank was invested, and that so far as the capital of the bank was invested in Government securities, the act was unconstitutional.

II. We shall first consider the point, whether the States possess the unlimited and uncontrolled constitutional right of imposing this tax, independently of any act of Congress, and we shall then consider the provisions of the National Banking Act, under which the State also claims the power to collect this tax.

We affirm that there is not a reason given for the judgment of this Court in the cases cited, but what may be urged with equal force by us in this case.

The Federal Constitution declares that the constitution itself, and the laws passed in pursuance of its provisions, shall be the *supreme law* of the land; and shall control all State legislation and the State constitutions, which may be incompatible therewith. The laws of the United States, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any State to the contrary notwithstanding.

Therefore, the material enquiry in this case is, whether the laws of New York imposing this tax, be consistent with the free operation of the laws of Congress, and the full enjoyment of the privileges conferred by them. If they be not, then the State law is void; if they be, then it is valid.

If the States may tax these shares of stock, to what extent shall they tax them, and where shall they stop? It is universally admitted that an unlimited power to tax, involves a power to destroy, because there is a point beyond which the stockholders of these banks cannot bear taxation.

If the States may tax the shares of these banks, they have no limit but their own discretion, and these banks must necessarily depend upon the discretion of the State Governments for their existence; for you cannot have these banks for National purposes, without requiring them to possess certain capital stock, and which must, from the necessity of the case, be divided into shares among the various stockholders.

The object in levying this tax may be, and doubtless was, to raise a revenue to the city, or the State. In the next case, the object may be to expel the bank from the State. But how is this object to be ascertained, or who is to judge of the motives of legislative action? If New York can suspend the operations of these banks, the same power can shut up the custom house, can impose a stamp tax on the judicial process of the Federal Courts, on permits, clearances, registers and all other documents connected with imposts and navigation. And what is to hinder her from imposing a tax upon the officers of internal revenue, the post office and the like, until she may completely block the wheels of the General Government within her borders. This tax is an attempt to raise a revenue for State purposes, by an imposition of taxes upon property and franchises holden under the authority of the General Government, and created by that Government for purposes connected with its own administration. There is not a single bank established under the authority of Congress, that can exist, if this right to tax its stockholders exists in the State Governments; and a surrender on the part of the Government, to the States, of this right, would be a giving up of those fundamental and essential powers, without which the Federal Government cannot be maintained. Which we shall show, as we proceed with our argument, Congress has no power to do.

A bank may not be, and is not, absolutely essential to the existence and preservation of the Government, but it is essential to the existence and preservation of the Government that Congress shall be able to exercise its constitutional

powers at its own discretion, without being subject to the control of State legislation. Congress having decided both the necessity and utility of establishing these banks, the State Governments cannot interfere with that decision, or obstruct in the slightest degree the operation of its measures. To hold otherwise, would be to hold and declare that Congress can only exercise its constitutional powers, subject to the controlling discretion of the State Governments.

These banks, as ordained by Congress, are instruments to carry into execution its powers. (See Opinion, 43 Barb. 559.) And in order to enable these instruments to operate effectually, they must be under the direction of the power that created them, and which is responsible to the country for their success. They cannot be interfered with or controlled in any manner by the States, without putting at hazard the accomplishment of the end of which they are but a means. But the asserted power to tax any of the institutions of the United States, presents directly the question of the supremacy of the National laws over State laws. If this power really exists in the States, its natural and direct tendency is to annihilate any power which belongs to Congress, whether express or implied.

All the powers of the National Government are to be executed in the States, and throughout the States; and if the State Legislatures can tax the instruments, the means, the machine by which those powers are executed, they may entirely defeat the execution of the vital powers of the Federal Government. If they may tax an institution of finance, so they may in like manner tax any other of the National institutions. *If the State may tax these stockholders to one degree, they may tax them to any degree. The right once admitted, and they may tax the bank out of the State.* Here a tax is imposed upon a species of property, between which and the taxing power there is no political connection.

It is argued that this is a question of great importance to

the people of the States so far as the same relates to the maintainance of the State Governments; but that consideration sinks into insignificance when compared with the *vital importance to the Union* that it should not be subject to the dictation or discretion of State legislation, as to the manner in which the Federal Government shall execute the powers essential to its very existence. And especially so at this time, when every muscle of the nation is exerted to its utmost to supply ways and means for the support of our Government and maintainance of its credit.

There is no express provision in the constitution which exempts any of the National institutions or property from State taxation. It is only by implication that the army, the navy and treasure of the Union are exempt from State taxation. Yet they are practically exempt, and must be, or it would be in the power of any one State to destroy their use. Is there any doubt at this day of the power of Congress to establish these banks? The right is and must be admitted; and it is self-evident that what the United States have the right to do, no individual State has the right to undo; and the power to establish carries with it the power to continue and preserve. *It cannot require argument to show that there is a manifest antagonism between the power to lay this tax, and the power of Congress to establish and preserve these banks.* The State discretion cannot be controlled by the National councils, or the action of the Courts. Whenever the State will it, all the National banks established within her limits must be expelled from the State; and if one National institution can be destroyed in this manner, all can be destroyed in the same manner. The success, yea, the life of this banking system is dependent upon the principles involved in this case. Once admit the right of State taxation, and the consequent right of State sovereignty and jurisdiction, and how long, we ask, will this banking system remain?

You have but to look at the Acts passed at the last session of our State Legislature, to see but the commencement

of State interference with these institutions. At the time this assessment was made, the statute was express that every person should be assessed for his personal property in the town or ward in which he resides. And it had been held, (1 *Kern.*, 563, 15 *N. Y.*, 316,) that an assessment made against a person, for personal property, in a town or ward other than that in which he resided, was illegal. Yet after this action had been submitted at the General Term, and while it was there pending and undecided, and after the county tax for 1864 had been levied and the warrant in the hands of the collector, the Legislature passed, on the 27th of March, an act ratifying and confirming this very assessment, (*Laws of N. Y.* 1865, *p.* 350.) Thus the Legislature did not hesitate to pass a retrospective statute, as to all stockholders not parties to this action, in direct violation of all principles of just and sound legislation. Yea, they did more,—they singled out the stockholders of this particular Bank, to confirm an admitted illegal assessment; leaving the stockholders of other banks in the State, who were in a like situation, to go free from taxation.

The stockholders of the First National Bank, located in the same ward with the Second National, were not assessed to the extent of one dollar; and the same was the case with the National Banks in the city of New York, and many other places in the State.

By the 11th section of the enabling act, (*Laws of N. Y.* 1865, *p.* 173,) *it is provided that National Banks shall retain so much of the dividends belonging to any stockholder, as shall be necessary to pay the taxes assessed upon the stockholder as such.* Here is a direct and positive interference with the management and conduct of these banks. And yet, if these banks, and their stockholders as such, are within the sovereign jurisdiction of the State, such statute may be upheld and enforced. And if the State may control the conduct of these banks to this extent, by legislation, where does the State jurisdiction end? What measure may the State not adopt for the control and management of these institutions?

The right of legislation once admitted, and there is no power to control or limit it. And there will be no end to the constant and interminable interference by State legislation, and among the various States there can be no such thing as a uniform system of banking throughout the country.

There is an absolute necessity of repressing such attempts in their infancy. A power to impose this tax carries with it a power to impose other taxes, without limit, and is in effect a power to repeal the law of Congress by which these banks are organized. These banks are as much institutions of the sovereign power of the Union as the custom house. *All the National property and institutions are constructively without the local territorial jurisdiction of the individual States, in every respect and for every purpose, including that of taxation.* If Congress has a power to do a particular act, no State can impede, retard or burden it. Can there be a stronger ground to infer a cession of State jurisdiction?

The certificates and bonds of the public debt, issued under the power of Congress to borrow money, and which are the basis of this bank, are means and instruments whereby Congress exercises that power under the Constitution. The money lent, while in the hands of the lender, is clearly subject to the sovereign power of taxation in the States; but the instant that it passes into the hands of the Federal Government, it (*i. e.* the *money*) is free from State taxation in any form. It is then withdrawn from the State power of taxation, and the lender has received, in lieu of his money, a certificate for its re-payment; which certificate is distinctly held to be as much a means for executing the power of Congress to borrow money, as are revenue cutters for enforcing the power of Congress to lay imposts and duties, and is exempt from the sovereign power of State taxation. But now it is attempted to bring the money lent, back under the sovereign power of the State, by taxing the creditor's title to its re-payment. Which title is distinctly a means whereby the United States procure the use of the money they obtain on

the public credit. *These banks and their stockholders, as to their shares of stock, are not residents within the sovereign jurisdiction of the State of New York, that is to say, the sovereign power of the State does not extend to them for any purpose.* And the State of New York might as well undertake to tax a National bank, or its stockholders, located within the sovereign jurisdiction of California, as one located within her own borders. The sovereignty of the State does not extend to them for any purpose whatever. But they are properly subject to the sovereign jurisdiction of the Federal Government alone, which is supreme to the sovereignty of the States.

It is clear that if the power to tax these shares of stock resides in the State Government, the State may select them as the special objects of taxation, at its own discretion, for the State is not hampered with any provision of the Federal or State constitutions to prevent it. The implied power to tax involves the power to discriminate between the subjects of taxation. If a discretion exists, the Courts cannot determine whether it was wisely or unwisely exercised. If the legislature has the power to deliberate and decide, the conclusion which it reaches is wholly beyond the scope of judicial or congressional action.

No exception to State taxation is claimed by express provision of the constitution. It arises under the general nature of the Government, and from the principle of the supremacy of the National powers and the laws made to execute them, over the State authorities and State laws.

These National banks, and the shares of stock held by the stockholders, which are but component parts of the bank itself, are as much the instruments of the Federal Government for fiscal purposes, as the Courts are its instruments for judicial purposes. MARSHALL, C. J., in delivering the opinion of the Court, says that "The means employed by the United States Government were given by the people of all the States, and that, therefore, the people of a single State could

not confer a sovereignty which will extend over them;" and the Baltimore case expressly decided that a note of the United States bank was one of the modes, or means, employed by the Federal Government, to execute its power to borrow money upon the public credit. But the circulating notes of the United States bank were no more a means for the purpose mentioned, than are the shares of stock in National banks. *A tax upon the shares of stock against the individual stockholders, results the same as a tax upon the capital stock of the bank against the bank itself; and as much impairs the efficiency of the instrument, as a tax upon the bank as such. And is a direct, positive, and may be effectual impediment to the free exercise by Congress, of those powers so vitally necessary to the preservation of the Union.* Upon this branch of the case, it can make no difference whether the stockholders are the owners of the bonds forming the capital of the Bank, or whether it is the corporation that owns them; if the result of the tax is the same, it would be void in the one case as it is in the other.

This tax is a tax upon property. It is not a tax upon the mere scrip of the stockholders, but it is a tax upon the stock itself. Now we would inquire, what is the property which is thus taxed? The capital of the bank is entirely invested in Government securities. (fol. 8 of case.) It owns no other property; and therefore the property of the individual stockholder which is taxed, is simply his interest in the Government securities, comprising the sum total of the capital of the bank. The incorporators of National Banks are required to state in their certificate of incorporation *the amount of capital stock, and the number of shares into which the same shall be divided.* (*Section 6 of National Banking Act.*) Now, it will be admitted, that a tax against the bank upon its capital, in its aggregate form, would be unconstitutional, because it would impede the power of Congress to borrow money; and yet it is argued that a tax upon the same capital, in another form, *i. e.*, when divided among the stockholders, is legal, notwithstanding it has precisely the same result of impeding the power of Congress, as a tax against the bank

itself. *It can make no possible difference, upon principle, or in the ulterior results, upon the power of Congress to borrow money, whether the tax is imposed upon the bank directly, or upon the individual stockholders: the abuse is the same in both instances.* If it was an impediment to the power of Congress to borrow money, for the State of Maryland to impose a stamp tax upon the circulating notes of the United States branch bank, because the United States bank was a means employed to execute the powers of Congress to borrow money upon the public credit, it is for the same reason an impediment to allow the States to impose a tax upon these shares of stock in this bank. The circulating notes were not indispensable to the existence of the United States bank. The bank could have done business and existed without them; but here these shares of stock are indispensable to this bank. No bank can be organized by a single individual under the statute. It requires at least five persons to form one of these associations, and their interests must be kept in the form of shares of the capital stock. It is true, that for certain purposes there may be a distinction drawn between the capital of a bank and the shares of its respective stockholders. Married women might not be able to form a corporation, yet they could take and hold the stock of the corporation. It is the substance and not the mere form that creates the prohibition. Could anything be more absurd than to say, you shall not tax the capital stock of a bank, because you may destroy it, but you may tax the individual holders of the same stock without limit or control, even though by so doing you may accomplish the injury to the General Government, that would result from a tax directly against the bank itself?

The learned Judge, in delivering the opinion of the Court below, cites the case *Regina vs. Arnaud*, 9 *Adol. & Ellis*, 860, from which he attempts to draw the conclusion that the stockholders are in no legal sense the owners of the bonds forming the capital of the bank. Without questioning the soundness of the case cited, we submit that the learned Judge overlooks the fact, that the immunity claimed is at-

tached to the securities themselves, and not to the person of the holder of them. What, we ask, has become of the immunity which was attached to these bonds at the time they were issued, in whose ever hands they might be?

It cannot be denied that the power to tax, once admitted, is unlimited, and we affirm that a State law, which imposes a tax upon any of the National institutions, is clearly repugnant to the law establishing such institutions; and it is a rule, that "A law absolutely repugnant to another, as entirely repeals that other, as if express terms of repeal were used." (4 *Wheat.* 428.)

2 Webster Private Corr. 519

It is submitted that the case rests upon the principles laid down by Justice MARSHALL, in the Baltimore case. He says:

"All subjects over which the sovereign power of a State extends, are objects of taxation, but those over which it does not extend, are, upon the soundest principles, exempt from taxation." "The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission, but does it extend to those means which are employed by Congress, to carry into execution powers conferred on that body by the people of the United States? We think it does not. Those powers are not given by the people of a single State; they are given by the people of the United States, to a Government whose laws, made in pursuance of the constitution, are declared to be Supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them."

"If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess and can confer on its Government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State

unimpaired; which leaves to a State the command of all its resources; and which places beyond its reach, all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty, from interfering powers, from a repugnancy between a right in one Government to pull down what there is an acknowledged right in another to build up, from the incompatibility of a right in one Government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the Government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

State sovereignty is supreme power, and it is clear that the sovereignty of the State in no manner extends over the property included in this tax. These banks do not hold the grants of their franchise by State authority. Nor are they introduced by State permission. From no State law, power or functionary, do they "borrow leave to be," nor can they be excluded by any such power, operating directly upon them, or indirectly through taxation. No law of the State can add to, or take from them powers or rights, and no act of the legislature can affect them one way or the other, and especially to their injury as instruments of the Federal Government.

It cannot be denied that these National banks are authorized by the Federal Government, as one of its fiscal means in sustaining the operations of the Government. It has long been considered by many that it was the constitutional duty of the Government to regulate the currency of the country. All other constitutional Governments assume it as

a prime necessity that they should establish a sound and uniform currency. The constitution grants Congress the exclusive right to "*coin money, and regulate the value thereof*," and forbids the States from emitting bills of credit, and making anything but gold and silver a legal tender. Some have claimed that these terms prevent the organization or chartering of State banks. That in consequence of Congress failing to exercise the powers thus conferred, we have never had a uniform or sound currency, and that the evils resulting, have been of great detriment to the country at large. Whether this be so or not, one thing is certain, that the financial necessities of the Government, consequent upon a state of war, have obliged the issue of vast amounts of Government bonds, the credit of which must be sustained. The Government was compelled to establish a banking system of its own, and one which has thus far worked much benefit, both to the Government and the people at large; and we are confident that this Court will not feel disposed to pronounce a judgment, the effect of which will inevitably destroy the entire system in its infancy, unless the law of the land sternly demands it.

The right of taxation is an incident of sovereignty, and the right of legislation is co-extensive with the incident, to attach it upon all property within the jurisdiction of a State. But in our system of government, there are of necessity limitations upon that right. There is a concurrent right of legislation in the States, and in the United States, except as both are restrained by the Constitution of the United States. Section 8 of the 1st article of the Constitution, has seventeen sub-divisions, each one of which contains a grant of one or more powers to Congress, all of which are to be exclusively exercised by it; except by the 10th section of the same article, Congress may give permission to the States to levy imposts or duties on imports, or tonnage; to keep troops and ships of war in time of peace; to enter into an agreement or compact with another State or foreign power; and to engage in war; but without such express permission of Congress, the States have no authority to interfere with

any of the powers granted to Congress. Among these powers exclusively vested in Congress, is the power to "borrow money upon the credit of the United States," *and the States are restrained by such prohibitions, as are necessarily implied when the exercise of a right by the States conflicts with the free and perfect execution of another sovereign power delegated to the United States.* That conflict occurs when taxation by a State, acts upon the instruments or means or persons which the General Government may use or employ, as a necessary or proper mode of executing its sovereign powers.

Applying these principles to the question presented to this Court, in *Dobbins vs. The Commissioners of Erie Co.*, 16 *Peters*, 435, where a statute of Penn. provided that an account should be taken of "*all offices and posts of profit*," and making it the duty of assessors "*to rate all offices and posts of profit, professions, trades and occupations at their discretion, having a due regard to the profits arising therefrom*," it was held that a captain of a revenue cutter of the United States, on Lake Erie, was not liable for taxes under the law, such officer being rated and assessed for his office at $500 per year. It was argued that it was the *emoluments* of the office, and not the *office*, that was taxed; but whether it be one or the other, the tax was equally void. *The act should have restricted the assessments to offices and posts of profit held under the sovereignty of the State, and not have included offices and posts of profit of another sovereignty—the United States.*

Justice WAYNE, in delivering the opinion of the Court, says: "Is not compensation [to the officer] the means by which his services are procured and retained? *It is true it becomes his when he has earned it. If it can be taxed by a State as compensation*, will not Congress have to graduate its amount, with reference to its reduction by the tax? Can Congress use an uncontrolled discretion in fixing the amount of *compensation*, as it would do without the interference of such a tax? The execution of a national power by way of

compensation to officers, can in no way be subordinate to the action of the State Legislatures upon the same subject. It would destroy all uniformity of *compensation* for the same service, as the taxes by the States would be different. To allow such a right of taxation to be in the States, would also in effect, be to give to the States a revenue out of the revenue of the United States, *to which they are not constitutionally entitled, either directly or indirectly, neither by their own action nor by that of Congress.*" Concede for the moment, that there is a distinction between a tax upon the capital of the bank, and a tax upon the shares of stock, which "is a distinction without a difference," yet how perfectly the reasoning and language of the Court applies to the case now under consideration. In the very language of the Court, is not the *compensation* which these stockholders receive, the means by which the use of their money is procured and retained? It is true it becomes theirs when it is earned, but if it can be taxed by the State in any form, either by a tax upon the capital stock or its shares or dividends, will not Congress, in order to procure the use of the means thus sought, have to graduate the amount of *compensation* which it offers, in order to induce investments in this system of banking, with reference to its reduction by this tax? Could Congress use an uncontrolled discretion in fixing the amount of *compensation* which stockholders in National Banks are to receive, as it could do without the interference of such a tax? The execution of a national power by way of compensation to persons who afford the means to Congress to execute its powers, to give life and sustenance to the Government, can in no way be subordinate to the action of the State Legislatures upon the same subject. It would destroy all uniformity of compensation. "It would, in effect, give to the States a revenue out of the revenue of the United States, *to which they are not constitutionally entitled, either directly or indirectly, neither by their own action nor by that of Congress.*" But for this right of State taxation, Congress might direct the issue of a class of bonds to be used exclusively for banking, at a much lower rate of interest than it could do with the right of taxation in the State.

If a tax upon the income of an officer of the United States, received as *compensation* for his services, would be unconstitutional, simply because the Government might be obliged to graduate his *compensation* with reference to the tax, then it is clear that a State tax (whatever may be its form) which may have the effect of obliging Congress to increase its rate of interest upon the public debt, or taking upon itself burdens beyond what it would not otherwise be obliged to do, is equally unconstitutional. The State of Maryland, in 1821, passed an act requiring all importers and others selling imported goods by wholesale, to take out a license, for which they were to pay $50, and in the case of *Brown vs. The State of Maryland*, 12 *Wheat.* 419, the act was held unconstitutional, and Chief Justice MARSHALL, in delivering the opinion of the Court, says, (*p.* 439): "It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue of the Government so far as it is drawn from this banking system.

But it is argued by the Court below, (43 *Barb.* 562,) that a supposed and merely possible inconvenience, which might arise from an improper use of State power, furnishes no ground for holding against the existence of the power; that we must be continually liable to this inconvenience from the complex nature of our Government. "That there is scarcely a power vested in the States, which may not in some way and at some time, be wielded against the General Government. The States may, in exercising the taxing power, take from the citizen all or so much of his property as to disable him from paying taxes assessed by the Federal Government." These arguments are fully discussed by Justice MARSHALL, in the case in 12 *Wheat.* At page 440, he says: "These arguments apply with precisely the same force against

the whole prohibition. It might, with the same reason, be said that no State would be so blind to its own interests as to lay duties on importation, which would either prohibit or diminish its trade. Yet the framers of our Constitution have thought this a power which no State ought to exercise." But conceding that it is not a mere possible inconvenience in the exercise of powers, that creates the prohibition, yet an immediate and constitutional repugnancy, that can by implication, alienate and extinguish a pre-existing right of sovereignty, is a violation of the Constitution. (*Federalist, No.* 32.) If the State has this uncontrolled constitutional right of taxation, without any affirmative act of Congress permitting it, then it may enact that the stockholders of National banks shall pay all of the taxes of the State, and thus deny to the stockholders of these banks the right of using the franchise, which they have purchased of the United States, until they have also purchased it from the State. What do the stockholders of these banks obtain by the purchase of their franchise of the General Government, if they do not purchase the right to use it without State interference?

The distinction taken that this is not a tax on the bank, nor is it, *eo nomine*, on stocks of any kind, *but is upon the person of the stockholder for stock held by him*, can have no influence on this part of the case; for it is too obvious for controversy that both equally interfere with the power of Congress. This precise question was up in the case of *Brown vs. The State of Maryland*, (*supra*,) where the tax was placed upon the *person of the importer, not upon the goods imported;* and it was argued that you could not abridge the acknowledged power of a State to tax its own citizens, or their property, within its territory. But Justice MARSHALL, in reply, says: "We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so used as to come in conflict with those vested in Congress. When this hap-

pens, that which is not supreme must yield to that which is supreme." "It results from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the National Government within its proper sphere. It cannot reach the administration of justice in the Courts of the United States, *or restrain the operation of any law which Congress may constitutionally pass.* If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit from one port to another for re-exportation." This attempt to distinguish between a tax against the bank upon its capital and a tax against the shareholders upon their shares of capital, or a tax upon the use made of Government securities, is but varying the form, without varying the substance. It is impossible to conceal from ourselves the fact that the injury to be avoided by the prohibition is the same, whether it be the one or the other. *This attempted distinction is treating the prohibition, which is general, as if it were confined to a particular form or mode of doing the forbidden thing.* (12 *Wheat.* 444.)

The prohibition claimed is not special or limited simply against the bank itself. There is no express prohibition against taxing National securities or National Banks, but the prohibition is general, against allowing the States to do anything that will impede the exercise of the powers granted to the General Government. No matter what may be the power claimed by the States, whether it be a tax on National securities, a tax on imports, or a tax upon these shares of stock, if the result upon the powers of Congress is the same, the same prohibition in the one case must equally apply to the other. (12 *Wheat.* 444.)

Justice NELSON, in the last case before this Court, (*State of N. Y. vs. Commissioners*, &c., 2 *Wallace*, 200,) says: "Where the capital of the banks is required or authorized by law to be invested in stocks, and among others in United States stocks, under their charters, or articles of association, and this capital thus invested is made the basis

of taxation of the institution, there is a great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but in the theory and practical operation of the system, is composed of substantial property, which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community." The Legislature had by *chap.* 240, *L.* 1863, provided in substance that State banks should be liable to taxation on a *valuation equal to the amount of their capital stock paid in or secured to be paid in*, and it was urged that the capital of the bank was not taxed at all, that the tax was in the nature of a royalty for their franchise, and not a burden on the property itself, that the State had the constitutional right to say that the banks of the State should pay all the taxes of the State in their discretion; but it was held that so far as the banks held securities of the United States, the act was unconstitutional, which we submit is going much further than we ask the Court to go in this case.

Judge MULLIN and also Judge DENIO cite the case of *Bulow vs. The City of Charleston*, 1 *Nott & McCord*, 527, where it was held that the stock of the Bank of the United States, in the hands of individuals, may constitutionally be taxed by the States. Also the case of *State vs. Collector*, 2 *Bailey*, 754, where it was held that an act of the State of South Carolina, imposing a tax of one per cent. on all dividends of banks not chartered by the State, was valid.

The former occurred in 1819, the latter in 1830, and both of which cases are distinctly over-ruled by the principles of subsequent cases, in the Supreme Court of the United States. Upon the argument below, some stress was laid on the *dictum* of Justice MARSHALL in the case of *McCullock*, at the close of his opinion. Upon examination, it will be found

that he did not intend to pass upon the question as to whether a State tax upon "the stock of the United States Bank," in the hands of a stockholder, was valid or not.

III. The Courts have always held that Congress might pass a law exempting Government Securities from State taxation, and such a law was passed by Congress on the 25th of February, 1862.

The 2d section in terms declares that "all stocks, bonds, and other securities of the United States, held by individuals, corporations or associations, within the United States, shall be exempt from taxation by or under State authority."

It was under that act that $166,000 of the stocks composing the capital of this bank were issued, but the exemption also extends to all stocks of the United States, and applies to the 10.40 bonds equally with the 5.20 bonds. Indeed the act of March 3, 1864, under which the 10.40 bonds were issued, also expressly declares that "all bonds issued under this act, shall be exempt from taxation, by or under State or municipal authority," and no act of Congress will be found in any manner changing the exemption thus given.

Now, it is clear that if these bonds were held by individuals, they would not be the proper subject of State taxation. *Weston vs. The City of Charleston.* It is equally clear, that a tax on the bank would be void. *McCullough vs. Maryland.* So, too, a tax upon the capital stock of the bank has been held to be a violation of the Constitution. *The Bank of Commerce vs. Commissioners of Taxes, &c.* In what respect is the principle changed, when a number of individuals, instead of retaining their bonds in their own custody,

deposit them, under the authority of Congress, with an officer of the Government, appointed for that purpose, and receive from the common agents, who make the deposit, a certificate or a paper simply containing the evidence as to the amount of the individual interests in the common deposit? A party holds five thousand dollars of Government bonds; it is admitted that they are not within the sovereign jurisdiction of the State; he subscribes for stock in one of these banks, and pays in his bonds as a part of the capital. It is claimed he is now liable to be taxed. Will some one tell us, when and how the State obtained its sovereign right of taxation, which it now proposes to exercise? What act has been done by the holder of the bonds to confer this sovereignty? and how is it that the prohibition of the Constitution, so proper for the public safety, has ceased to operate?

What is the interest which these stockholders possess in the capital of this bank, and which is now attempted to be reached for taxation? We answer, it is an interest in the capital stock of the bank, and nothing else. And of what is the capital stock of the bank composed? We answer, Government securities, which are declared by the Constitution of the United States, the supreme law of the land, to be exempt from State taxation; which are declared by the laws of Congress, made in pursuance of the Constitution, and therefore supreme over any State law, to be exempt from State taxation; and which are declared by the highest Court in the land, to be so exempt; and which capital stock is but the aggregate of the individual interests of the stockholders.

No State in the Union has a greater interest to maintain the integrity of the Constitution, to preserve throughout all our National institutions, and hand down to posterity our Union as we received it from our fathers, defended against the dogmas of State rights, as well as the attempts at destruction by open rebellion, than has the State of New York. The necessities of our Government for money are urgent.

To meet those necessities and maintain the public credit, requires that all the powers of the Nation should be brought into active operation; that they should be in no manner obstructed by State action; that no surrender of those powers so essential to National existence, should be made to the States by Congress, without the plainest sanction of the Constitution. We believe the people of our State, however onerous may be their taxes, would be the last to enforce this tax, if in so doing it will in any manner conflict with the Constitution, by obstructing any of the means which the Government may constitutionally employ to maintain the public credit.

There may be, and doubtless are, a class of men whose minds never comprehend anything extending beyond self-interest, who will cry out against the injustice of allowing one to enjoy all the advantages of society and protection of his property and rights, and live in affluence upon an income derived exclusively from interest on Government stocks, exempted from taxation. But it should be remembered that these National banks and National stocks are the proper subjects of National taxation, and as soon as it becomes the policy of the Nation to tax them, beyond what they are already taxed, that policy will be enforced. But it is clear that the present policy of the Nation is not to tax them beyond the present rate imposed by the laws of Congress, and especially not to allow them to be taxed for State purposes. National Banks already pay a large amount of taxes to the National Government. (See report of Comptroller Clark, 1865.) National Banks do not complain of being taxed by the National Government. They are willing to be taxed to the full extent that they can bear taxation, even at a greater rate than any other class of capital is taxed. This is not an attempt to avoid the just obligation resting upon all capital to pay its share to the support of the best Government this world ever saw, but is simply to resist the unjust demands of taxation by a power between whom and the property taxed there is no political connection whatever. Congress may in its wis-

dom, at the proper time, repeal or reduce the present income tax of the nation, and in its place impose a direct tax upon banking capital. National bankers are fearful of the power of State taxation, as well they may be, and their only desire is to know that the power of taxing them or their stockholders as such is placed in the hands of the National Government, which is alike interested and responsible for their conduct, interested to see that they are not ground down with unjust or oppressive taxation, and responsible that they are not allowed to make inordinate profits.

These banks are now taxed by Congress upon their circulation and deposits, besides a license tax. This is all the taxation which Congress, at present, in view of the Governmental policy of making these institutions useful to the Government and the people, have deemed it prudent and safe to impose, and any other or further burden should only be imposed by the same authority, and in furtherance of the same policy.

The foundation of the obligation to pay taxes is not, as some people suppose, the privileges enjoyed or the protection given to a citizen by the Government. Like protection is due to all. Those members of a State who do not, because they are not able to, pay taxes, are entitled to the same privileges as the greatest taxpayer in the country. (16 *Peters*, 446.) Married women and children have privileges and protection, but they are not assessed unless they have property separate from the heads of the families. So, too, with clergymen and charitable institutions. It is the necessities of the Government for money in times of peace or war, that fixes the obligation to pay such taxes as may be imposed by lawful authority.

IV. We come now to the consideration of the 41st section of the last Banking Act of Congress, approved June 4th, 1864. The language of the act is:

"Provided, That nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes, imposed by or under State authority, at the place where such bank is located and not elsewhere."

Now we deny that this section grants any authority whatever to make this assessment.

It is stated in the opinion in the Court below, that "it is not shown that any of the bonds held by these banks were actually issued by the Government prior to the passage of the act above mentioned." In this the Court, as a matter of fact, is mistaken. It distinctly appears in this case (fol. 8) that all the bonds composing the capital of the Second National Bank of Utica, were issued prior to the 1st day of June, 1864, which was four days before the passage of the said act.

It will be observed that the language is not that these shares "*shall be*," or "*may be*," included in the valuation of the taxpayers' property. But the language is that "nothing in this act shall be construed to prevent" their being included, &c. The forepart of the same section provides that "*in lieu of all existing taxes, every association shall pay to the Treasurer of the United States*" a certain tax upon its circulation, deposits and capital, and but for the subsequent provision of the same section above quoted it could well be argued that all State taxation was expressly prohibited. It is confidently submitted that upon any just construction of the forty-first section, when read as a whole, that Congress did not intend by the language used to grant any power to the States, not then possessed by them. It is neither

granted, prohibited or affected by the section, one way or the other, but leaves the right to tax or not tax to the provisions of the Constitution and laws as they stood prior to the passage of the act in question. It was clearly the intention of Congress, by the language used, neither to grant or restrict the general right of State taxation; but only, in the event that the States possessed the right to tax these shares under the Constitution and existing laws, and should exercise that right, then to provide that they should not show an unfriendly discrimination against National Banks, in favor of State Banks and other moneyed capital. It cannot be possible that Congress, by using the language, "Provided, That nothing in this act shall be construed to prevent," &c., intended thereby to grant or impart to the States so important a power as taxing these National institutions. If any such intention prevailed, the language employed would have been express.

The intention of the Legislature is to be searched for in the words of the statute. Courts cannot correct what they may deem excesses or omissions in legislation, without the danger of doing vastly more mischief than good. Where there is no ambiguity in the words, there is no room for construction. To determine that a case is within the intention of the statute, its words must authorize us to say so. When the intention, if entertained, is not expressed, it is the duty of the Court to declare "*quod voluit non dixit*," or when the words fall short of the intent, it is the duty of the Court to give effect to the expressed sense or words of the law, in the order in which they are found in the act, according to their fair and ordinary import and understanding; for it must be remembered that Courts are appointed to administer and not to make the law.

Sedgwick on Statutory Laws, 233, 243, 244.
Broom's Maxims, p. 60, (3d ed. p. 91.)

There are no express words granting this power to the States contained in the statute, and the words "*Provided, That nothing in this Act shall be construed to prevent*," are

the only words from which any such power can be implied or inferred. Were the same terms used in a deed between individuals, they could not be construed as granting any title or right beyond the express words of the deed.

It is submitted, that one of the obligations of the contract upon which these bonds were issued, was that they should be exempt from State taxation, either directly or indirectly, by assessing the shares of these banks. And it is not to be presumed that Congress would violate a sacred obligation of its contracts. Express language, leaving nothing to be presumed or implied, should be used to accomplish such a purpose.

V. But supposing that the terms of the statute were explicit and unequivocal, granting to the State power to tax these shares of stock, then the further question would remain, is it in the power of Congress to impart such a power? Can Congress relinquish to the States a sovereign power, which all the States have delegated to the Federal Government for the benefit of all? Can the legislative power of Congress confer upon the States an authority which the States can execute to the utter annihilation of our National institutions? If Congress may surrender to the States any such power in this instance, the same authority may surrender to the States any other or all of the sovereign powers granted by the States to the Federal Government. It has been held that the State power of taxation is a sovereign power within the scope to which it extends, and within this limit it admits of no supervision or control. *The People vs. The City of Brooklyn*, 4 *Comst.* 422. And if Congress can allow the States to lay this tax upon one of the means employed to carry out the general powers granted to Congress by the Federal constitution, it may in like manner authorize a State

tax upon United States bonds, *eo nomine*, or a tax by the States upon the custom house, the post office, the officers of internal revenue, or any of the means employed to carry on the Government. If Congress may surrender this right to the extent claimed, it may surrender it to any extent; until at last we find that the existence of our National Government depends upon the will of Congress. It is not the extent of the surrender, or the wisdom or policy of it in this particular instance, that we are discussing, but we deny the right to surrender to any extent, or for any purpose; for such a right or principle once admitted, would be fraught with the most evil consequences to our National existence. The constitution expressly prescribes in what cases Congress may grant to the States concurrent jurisdiction over the powers granted to Congress. Congress may give permission to the States to levy imposts or duties on imports or tonnage &c., but no express or implied power can be found in the constitution, granting to Congress the right to waive a constitutional immunity attached by the constitution itself to all government securities.

It will doubtless be argued that under the provisions of the 41st section, the States are prohibited from singling out these bank shares as especial objects of State taxation. The remark is true but to a limited extent, for the State may lawfully enact that the State and National Banks and moneyed capital of the State, shall pay all the taxes of the State, and thus relieve real estate from taxation. A concurrent power in the States to tax National institutions would inevitably lead to conflict between State and National authority. Accordingly, it is the clearly established law of the Federal constitution, in order to avoid all such conflicts, that the powers of the States are not held to apply to the subjects embraced in the execution of the powers of the United States. (*Cases cited.*)

It is clear that the sovereign jurisdiction of this State does not extend to the State of Ohio, and that Congress cannot confer any sovereign power upon a State, over subjects within

the sovereign jurisdiction of another power; but the sovereignty of the United States is as distinct from the sovereignty of New York, as are the two sovereignties of Ohio and New York. A National bank located in New York is subject to the sovereignty of the National Government, and Congress would have the same right to say to Ohio, you may tax National banks or their stockholders located in New York, as it would to grant the power claimed to be given by this statute. No! these National banks and their stockholders, as respects their stock, are as much without the territorial jurisdiction of this State, as the United States bank was in the Maryland or Ohio case, as the United States bonds in the Charleston case, as the importer in the Maryland case, as the salary in the case of the master of the Revenue Cutter, and as the Bank Stock in the New York cases.

In the language of MARSHALL, C. J., "the means employed by the United States Government were given by the people of all the States, and therefore, the people of a single State could not confer a sovereignty which will extend over them." The same principle is an insurmountable objection to the right of Congress to confer upon or surrender to a single State a sovereign power which has been voluntarily granted to the Federal Government for the benefit of the people of all the States. *It will not do to say that the surrender is not confined to a single State, but is universal as to all the States, because, if Congress possesses the power to impart such right to all the States in its discretion, there is nothing in the constitution to prevent it from limiting its liberality to a single State or combination of States to the entire exclusion of the others; and no judicial tribunal would have the power of reviewing such discretion.* The State of New York holds a much larger portion of Government bonds for banking purposes, than does any other State, and how is the State of Georgia, which may and probably does hold but few or none of these bonds for banking purposes, to share equally with New York the benefits derived from this system, which the people of one State are equally entitled with the people of another?

We believe that our Government is based upon a surer foundation than the will of Congress. Neither the executive, congressional or judicial departments of our Government, or all combined, have any power, under the constitution, to surrender to the States the least of the sovereign powers granted to the Federal Government, except as provided by express language of the Constitution. Nothing short of an amendment to the constitution, properly enacted, can reinvest the States with any of the sovereign powers delegated to the General Government. (16 *Peters* 448, *near bottom.*)

It is argued that the tax is not imposed or assessed upon the bonds, but *it is the uses they are devoted to that is taxed.* That if additional advantages are sought for these bonds, by making them available banking capital, the privilege of so using them should be so far paid for to the public, as it may be, by rendering the shares in the capital they create liable to State taxation; which is the only benefit derived, either by the State or Nation, for the valuable franchise conferred by the National banking law upon these associations. It is submitted that there is no real distinction between a tax upon the *use* made of these bonds and a tax upon *the bonds themselves.* There is no difference in the practical operation of the two taxes. The attempted distinction is but a disguise thrown about the case to elude detection. The true test is to consider the effect upon the power granted to Congress to borrow money for the support of the Government. The objects committed by the Constitution to the General Government are of immense magnitude, and require corresponding means. *Of all the modes of raising money for the maintainance of our Government, that of borrowing money upon the public credit is the most ready, fruitful, least oppressive, and we may add, is absolutely indispensable; and of all species of taxation, that which lays its hand in any manner upon this power of Congress is the most hurtful and destructive to our Government.* It was sound policy, therefore, for the framers of the Constitution to cherish and protect this power, by proper prohibi-

tions, against the States, because, whenever it fails, other modes of "ways and means" must necessarily be resorted to, of a more odious and oppressive nature. A tax upon the importer, as such, is a tax upon importation; a tax upon the master of a revenue cutter, or upon his emoluments, is a tax upon the office; a tax upon the income of these bonds is a tax upon the bonds; and a tax upon the capital of a bank, invested in Government bonds, is a tax upon the bonds, and nothing can be clearer than that a tax on the use of an article is a tax on the article itself.

But it is said, that the privilege of using these bonds for banking purposes, should be paid for to the people of the State, as though the people of a State conferred the privilege. What right or equity have the people of a State to require compensation for a franchise granted by the people of the United States? Again: it is said, this right of State taxation, is the only benefit derived, either by the State or the Nation, for the franchise conferred. As though Congress has established this banking system, and enacted laws destructive to State banks, without deriving some advantage to the General Government! Was the system adopted to benefit the States, by giving them a right to tax the shareholders? and is it true that the nation is to derive no benefit except through State taxation? It would be an insult to common intelligence for us to occupy time in showing the benefits directly derived by the General Government, and the people of all the States, in the practical operation of this system of banking. It would seem clear that Congress cannot confer any sovereign power upon the States, which the States do not already possess, and cannot surrender to the States any of the powers conferred upon the Federal Government by the constitution.

VI. Admitting for the moment that Congress may grant permission to the States to tax these shares of stock, and that such permission is fully granted by the 41st section of the act of June, 1864, yet there is provided in the same section an express condition to the exercise of that right, which under the existing laws of the State utterly prohibits the levying of this tax. The language is, "*Provided, That the tax so imposed under the laws of any State upon the shares of the associations authorized under this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located.*" Now, construing this language strictly, and the condition provided is not performed by the State, as there is no law in this State imposing any tax whatever upon the shares of Stock in State banks. But it will be said that State banks are taxed on their capital to the full extent that such capital is subject to taxation, and that a tax upon the capital of a bank is the same in effect as a tax upon the respective shares of its capital. But this is "blowing both hot and cold." On one branch of the argument, we are told there is a wide distinction between a tax upon the *capital* of a National bank and a tax upon the *shares* of the bank; but when the same rule is to be applied to a State bank, we are told that in effect and *practical* result, a tax upon the *capital* and upon the *shares*, is one and the same thing. This sort of quibbling is not becoming so important a subject. The question on this branch of the case is the same as on the other branch, viz: one of intention. What, we ask, did Congress intend by inserting this proviso or condition? what mischief was it of State legislation that Congress designed to defeat? what protection to National banks did Congress expect to afford? Why did they insert the condition at all, but for the express and only purpose of placing these National banks on as favorable a footing as State banks? It is too plain for argument, that the intention was that a National bank, of a given capital, should not be required by the States to pay twice the amount of State taxation, that a State bank standing by the side of it pays with a like capital. It is presumed that the taxing officers

conform to the judgment of this Court, in the Bank tax case, in 2 *Wallace*, by deducting from the valuation of State banks the amount of their capital invested in Government securities. If Congress intended any thing, it certainly intended to prevent just such inconsistencies as have occurred all over the State of New York. In the same city in which this bank is located, we have one State bank with a capital of six hundred thousand dollars, which is assessed this year upon a valuation of one hundred and fifty-eight thousand dollars; another of four hundred thousand dollars capital, which is assessed upon a valuation of one hundred and fifty-five thousand dollars; and another of a capital of one hundred and twenty-five thousand dollars, assessed upon a valuation of fifty-five thousand dollars, because they have invested the greater part of their capital in Government securities; while this National Bank, with a capital of three hundred thousand dollars, all of which is invested in the same securities, is assessed to the full amount of three hundred thousand dollars, by assessing the respective stockholders; and such is the practical result all over the State. A and B are each the owners of $100,000 of Government bonds. A invests his in the organization of a State bank. B invests his in the organization of a National bank. The bank of A is free from State taxation, while B is taxed to the full amount, by taxing his shares of stock. Can it be said in any sense, that the *rate* of taxation is the same in both instances? It seems to be admitted that it was the intention of Congress to protect the shares of the National institutions against inequality and unjust discrimination, but we are told that this intention is well complied with by the adoption of a general and equal standard of taxation, so far as it is possible to prescribe it, for the State and National banking institutions alike. If certain State banks are able to avoid taxation altogether, by reason of the investment of their capital in United States stocks, it does not shield other banks from taxation that have done nothing of that kind. It is submitted that this does not constitute an *equal standard of taxation, for State and National institutions alike.* If it is competent for the State to tax the *shares of National Banks*, it is

certainly both *possible and competent* for the State to tax the *shares of State banks, notwithstanding their capital may be invested in National securities.* The Bank tax case in 2 *Wallace* was decided by this Court early in the year 1865, and prior to the passage by the State of the Enabling Act, (March 9, 1865.) If the Legislature were really desirous of preventing this large moneyed interest from escaping State taxation, why did they not include in the same section of the Enabling Act, a provision for the taxing of the shares of State as well as National banks? The conclusion to our minds is irresistible, that the intention of the State Legislature was to place the State banks on a more favorable footing than the National banks, as respects the subject of taxation. It is said that it is a reasonable compliance with this provision, that the rule of taxation is enforced in the same manner upon all banks, both State and National, so far as any measure of taxation can be applied to them, and that is sufficient, because it secures the observance of the promise that the shareholders in the National associations, shall be taxed at the same rate as those owning stock in the banks created under the State laws. That the banks not taxed on account of their capital being invested in Government securities, must be regarded as simply creditors of the Government without taxable property. It is submitted that practically the rule of taxation is *not* enforced in the same manner upon State as on National banks; that it does *not* secure the observance, in any sense, of the promise that the shareholders in State and National banks shall be taxed at the same rate; and that a State bank investing its capital in Government securities, is no more a creditor of the Government without taxable property, than is a National bank investing its capital in the same securities; and that this mode of taxation is not carrying out the spirit or intent or letter of the condition imposed by Congress. The word "*rate*" as used in the statute, does not refer exclusively to the ratio of the tax; to thus limit its meaning would be absurd. Congress certainly did not intend to say to the States, you must not impose a tax of 2 mills on the dollar upon the shares of National

banks, unless you impose the same tax of 2 mills upon the shares or capital of State banks, yet you may impose a tax of 2 mills upon the shares of National banks, but in taxing State banks you may value their capital at one-half or one-quarter, in case they have invested the rest of their capital in Government securities, and thus in fact and effect, accomplish the very same practical result that you would accomplish by the course prohibited. Could anything be more absurd? The intention of Congress was one of substance, but the construction given by the Court below would make their act but a "play upon words," an idle form and of no effect whatever.

This condition precedent to the right to impose this tax seems to have been entirely overlooked by the Court below. They wholly ignore the express words of the statute: "That the tax so imposed under the laws of any State" "*shall not exceed the rate imposed upon the shares in any of the Banks organized under the authority of the State.*"

The argument of the opposing counsel in the Court below was, that it could not be said that the shares of National Banks were taxed at a greater "*rate*" than the shares in State banks, inasmuch as the shares in State banks are not taxed any "*rate.*" That the shares in State banks not being taxed, there is no room or basis for comparison. We submit that the statement of the argument is a complete and full refutation of it.

So long as the present system of State taxation of State banks is retained, of taxing the capital of the bank, and not the individual shareholders upon their shares of stock, the State is prohibited by express act of Congress from imposing taxation upon the individual stockholders of National banks.

29 Howard (N. Y. Prac. Rep.) 371. The People *ex rel.* Lincoln vs. Town of Barton.

EDMONDS & MILLER,
WM. M. EVARTS,
Counsel for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

G. CLARENCE CHURCHILL, impleaded, &c.,
Plaintiff in Error,
vs.
THE CITY OF UTICA, *Defendant in Error.*

Points for Defendant in Error.

The questions presented arise upon a case agreed upon by the parties, pursuant to section 372 of the Code of Procedure for the State of New York; (fol. 6;) and wasfirst heard at a General Term of the Supreme Court of that State.

The Supreme Court gave judgment in favor of the City of Utica, the above named defendant in error, against Churchill, the above named plaintiff in error. (15, 16.) The opinion of the Supreme Court was written by Justice MULLIN.

On appeal by the plaintiff in error, to the Court of Appeals of the State of New York, the judgment of the Supreme Court was affirmed, DENIO, Ch. J., writing the unanimous opinion of that Court.

The case agreed upon by the parties, states that the Second National Bank of Utica, is a banking corporation, organized in December, 1863, under the act of Congress of February 25, 1863, and the acts amendatory thereof. (6.)

The Bank commenced business in January, 1864. The

capital of the Bank is $200,000, divided into shares of $100 each. (7.)

The Bank was and is located and carries on business in the First Ward of Utica. On the 1st of July, 1864, and when the assessment complained of was made, Churchill, the plaintiff in error, resided in said First Ward, and owned fifty shares of the stock issued by the banking corporation. (7.)

The plaintiff in error was assessed and taxed under and by virtue of the State laws, for and on account of the stock owned by him, to the amount of its par value, the same as he would have been assessed and taxed for that amount of other personal estate, owned and possessed by him. (9, 10, 11.)

At the time of the assessment, the capital of the Bank was invested in the bonds and other securities issued by the United States, prior to the first of June, 1864. (8.)

A portion of these bonds are known as "Five-twenties," and were issued by virtue of the act of Congress of Feb 25, 1862; and the residue are known as "Ten-forties," and were issued by virtue of the act of Congress of March 3d, 1864. (8.)

The question presented for consideration is, are the owners of shares of stock issued by the National Banks, the capital of which is invested as above stated, liable to taxation for and on account of the same under State laws? or are they exempt from all State and municipal taxation?

I. A very large amount of the personal estate of the country, is and will be permanently invested for the profit of

its owners in the stock of these banking corporations; and hence the claim made that the owners of the shares of stock are to be exempt from all State and municipal taxation, on account of the same, raises a question of serious practical importance.

1. On the 1st of December last, the amount of stock in these Banks, at its par value, was in the State of New York, $115,217,941.00; and in the Union, $404,159,493.00.

2. If this is exempt, it throws all the burden of sustaining the local government and institutions, of which the owners of this stock share the benefit, and which are essential to their protection and welfare, upon others, and mainly upon the owners of real estate.

II. The shares of stock created and issued by the National banking corporations, are personal property; and the owners are liable to taxation, on account of the same, as a part of their personal estate under the State laws, unless they are exempted by the Constitution of the United States, or by laws made in pursuance thereof.

1. That the shares of stock are personal property, is declared by the act of Congress which authorizes these corporations.

   National Bank Act, approved Feb. 25, 1863, § 12, found in U. S. Statutes for 1862–3, p. 668.

   Act of June 3d, 1864, § 12, found in U. S. Statutes for 1863–4, p. 102.

2. Without reference to the act of Congress, the shares of stock are personal property, belonging to the individual shareholder.

"Personal property," says Chancellor KENT, "includes all subjects of property not of a freehold nature, nor descendible to the heirs at law."

2 Kent's Comtrs., 1st ed., p. 341.
Ibid, 4th edition, p. 341, and note *a*.

The general doctrine of American law is, that shares of stock in corporations are personal property, notwithstanding the capital of the corporations is invested in real estate.

Hilliard's Abr. vol. I. p. 18.
Hutchins vs. State Bank, 12 Metcalf, 426, per Shaw, Ch. J.
Slaymaker vs. Bank of Gettysburgh, 10 Barr. 373.
23 New York R., 219, 220, per Comstock.

3. By the statutes of New York, all lands and all personal estate are made liable to taxation, subject to the exemptions specified; and "stocks in monied corporations," are declared to be personal property. (1 *Revised Statutes of N. Y., 1st ed., p.* 387, §§ 1 *and* 3. *Ibid, 5th ed., p.* 905, §§ 1 *and* 4.) By the same statute, it is declared that all property, real and personal, is exempt from taxation, which is exempted under the Constitution of the United States. (1 *Revised Statutes, supra,* § 4 *in 1st ed., and* § 5 *in 5th ed.*)

There is, therefore, no conflict between the State statutes and the Constitution and laws of the United States.

The only question is, are these shares of stock ex-

empted from taxation by the Constitution and laws of the United States, properly construed. The Supreme Court and the Court of Appeals of the State of New York, by decisions which were unanimous, held they were not.

III. The owners of the shares of stock created and issued by these banking corporations, are not exempted from taxation on account of this property, *on the ground that the corporations are instruments or agencies of the Federal Government.*

1. This proposition, it is submitted, should be regarded as the settled law of the United States in reference to these National Banks, because:

(1.) The former Bank of the United States was far more appropriately regarded as an instrument or agency of the Federal Government, than the Banks authorized by the present act of Congress can be. (3 *Story's Laws, p.* 1547.) The existing institutions partake far more of the character of private corporations, organized and doing business with a view to individual gain rather than for public purposes, than did the former Bank of the United States. By the act of Congress of 1816, only one corporation was created; its capital was limited to $35,000,000; $7,000,000 of this was owned by

the United States; and five of the twenty-five directors were appointed by the United States. (§§ 1 *and* 8 *of act of* 1816.) It was charged with public duties, as the agent of the Government. (§§ 15 *and* 16.) It was not designed to absorb all or any considerable part of the banking capital or banking business of the United States. (3 *Story*, 1555, 1556, § 11.)

The institutions authorized by the present act are, for practical purposes, without limit as to number or amount of capital. They are designed to and will absorb all the banking capital and banking business of the country. Comparatively but few of them are necessary or will be used as depositories of the public moneys, or as agents for transmitting the public funds.

The former United States Bank was held by the Court to be an instrument or agency of the Federal Government, necessary and proper for the execution of its powers, like the mint or the post-office; and on this ground it was decided that the corporation was not subject to taxation by State authority on account of its business or capital. The Court held that the private business transacted by the Bank for individual profit was incidental to its public character and the public objects for which it was created.

McCullough vs. Maryland, 4 Wheaton, 316.
Osborn vs. Bank of U. S., 9 Wheaton, 738, 859, 86.

(2.) Nevertheless, this Court, nearly forty years ago, in 1819, after the taxing power of the States in reference to the former Bank of the

United States had been elaborately argued by very distinguished counsel, and thoroughly examined and discussed by the Court, held and declared the law to be that the owners of shares of stock in that Bank were subject to taxation under State authority on account of the same as a part of their property.

In the case of *McCullough vs. Maryland*, Chief Justice MARSHALL, after stating all the grounds and reasons for exempting the Bank, arising out of its character as a creation and instrumentality of the Federal Government, which are now urged for exempting the individual owner of shares of stock, on this ground says: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the Bank, in common with the other real property within the State, nor to a tax imposed *on the interest which the citizens of Maryland may hold in this institution* in common with other property of the same description throughout the State."

4 Wheaton, p. 436.

(3.) The former Bank of the United States continued till the expiration of its charter in 1836. The law, as above declared, was not, during all this time, nor until *after* the passage of the act of Congress authorizing the existing Banks, questioned. All departments of the Governments, National and State, adopted and acquiesced in it as defining the correct boundary between what was and what was not, as connected with an institution of this character, subject to State taxation. The owners of the

stock in the former Bank of the United States were taxed on account of the same by all the States.

Mr. WEBSTER, whose opinion is entitled to great weight on this question, in a speech delivered in the Senate, in 1832, when a proposition to subject the branches of the United States Bank to taxation by the States in which they might be located according to the amount of their loans and issues was under consideration, said: "Allow me now, Mr. President, to inquire on what ground it is that the States claim this power of taxation. They do not claim it as a power to tax all property of their own citizens. This they possess without denial or doubt. *Every stockholder in the Bank is liable to be taxed for his property therein by the State of which he is a citizen. This right is exercised, I believe, by all the States which lay* taxes on money at interest, income and other subjects of that kind."

Works of Daniel Webster, vol. 3, p. 411.

(4.) The existing Banks were created with a knowledge by Congress of the rule of law thus laid down in the *McCullough* case and subsequently recognized; and apparently with express reference to and in affirmance of it.

National Bank Act of June 3d, 1864, § 41.

The act of February, 1863, did not contain the provision last above referred to. After its passage the liability of shareholders began to be discussed. In the act of June, 1864, repealing the prior one, Congress expressly affirms

the rule of law laid down by Chief Justice MARSHALL.

It is submitted, therefore, that the liability of the shareholders to taxation is not an open question.

2. But if this were a question now to be decided for the first time, the shareholders should not be held exempt.

(1.) The tax is upon the citizen of the State on account of personal property owned by him. It is not a tax on the corporation, or its capital property or operations.

See suggestions and authorities under IV point below.

(2.) The banking corporation is of a mixed character. The stockholder purchases and holds shares of stock for private gain, not for public objects. With this view, he invests wealth, which previously was subject to taxation for State purposes, in shares of this stock, and derives an income from the investment, as he would from money loaned to one of these Banks for the purpose of its business. He shares all the benefits of the State Government, and should contribute to its expenses, according to his wealth.

The public purposes of the corporation exempt *it* from taxation. The shareholder does

not partake of this public character, and should not be exempt. The State must raise revenue by taxation. Its legitimate taxing power is to be exercised in harmony with the exercise by the Federal Government of its paramount authority. So far as may be, such a construction should be given and such a rule established as will enable them to act harmoniously.

The rule of law laid down by Chief Justice MARSHALL, in reference to the old Bank, was a reasonable and practicable one. While it exempts the corporation from State authority, it leaves the citizens of the States subject to taxation on their individual property.

This, for all practical purposes, protects the instrument, or agency, of the Federal Government from State interference; and the large amount of wealth invested by citizens, for private gain, in the stock issued by the corporation to them, is not withdrawn from its just share of public burdens.

3. This rule of law will not lead to any obstruction to the Banks from State legislation.

(1.) It did not in reference to the former Bank of the United States, as to which there was more rivalry from State Banks, and against which there was more hostility than there is or will be to the existing institutions. The present system of National Banks has and permanently

will supplant all State Banks; and it is substantially open to all who desire to engage in the banking business.

(2.) The argument that the State may subvert or destroy the National Banks, by taxing its citizens on account of the stock they may own, is not entitled to weight.

This argument presupposes an abuse by the State of its taxing power. It legitimately would prove, that the States could not be entrusted with the exercise of the taxing power over its citizens and their property at all.

There can be no abuse. The share owners are to be taxed on account of the stock, the same as on account of other moneyed capital.

There will be no motive to misuse the taxing power. The people of each State will be disposed to have its citizens share in the advantages of these Banks, and in the profits derivable from investments in the shares of their stock. The same argument would prove that the State could not tax its citizens on the income received from these shares of stock. This will not be claimed.

4. If the shareholders in these Banks, are exempted on account of the character of the corporation, it is submitted that persons owning shares of stock in Rail-

road corporations, created by Congress, will be exempted from State taxation on account of the same.

IV. Nor are the owners of the shares of the stock of the banking corporations exempt from taxation, *on the ground that the capital and property of the corporation* are invested in or consist of the bonds or other securities issued by the United States to borrow money.

1. These bonds and securities are exempt from taxation; and the *owner* of them cannot be taxed for or on account of them, under State authority.

   Weston vs. The City of Charleston, 2 Peters, 449.
   Bank of Com. vs. New York City, 2 Black, 620.
   Bank Tax Case, 2 Wallace, 200.

2. The corporation is the *owner* of these bonds and securities. This legal being has perfect title to these bonds and securities, and all other property of the corporation. This legal being is the *owner* of the capital of the corporation; and of all the property in which the capital and funds are invested. The immunity from taxation, on account of the bonds and securities in question, is in favor of the *owner*. In this case, in favor of the banking corporation which owns and holds them.

3. The tax in question is not upon the banking corporation. It is not a tax upon the property in which the capital of the corporation is invested, or upon or on account of the United States bonds, or other securities owned by the corporation.

No such power in allowing state taxation - Tax not upon bank but a franchise - capital not exempt Stocks -

4. The tax complained of is upon the plaintiff in error, individually, *for and on account of personal property owned by him, absolutely and in severalty.*

(1.) This personal property is called shares of stock. It is created by the corporation. The individual purchases it from the corporation. The money which he pays to the corporation for it, becomes the money of the corporation, and the stock his individual property. In its general characteristics, it is like a chose in action. The owner can sell and transfer it; his creditors can reach it; he may bequeath it, or if he die intestate it passes to his administrator.

See references and authorities on 1 and 2 sub. of II. Point above.

(2.) This property is not of the *character* of that in which the capital or funds of the Bank is invested. Notwithstanding the entire capital and funds of the corporation were invested in land, the stock owned by the shareholder would be personal estate.

2 Kent's Comtrs. and 1 Hilliard's Abr., cited on Second Point above.

(3.) The plaintiff in error, the owner of the shares of stock, has no title to, and is not in any sense the owner of the United States bonds, or other securities in which the Bank has invested its capital or funds. These bonds and securities are owned solely by the banking corporation.

The Queen vs. Arnaud, 9 Ad. & Ellis, N. S. 806, 817, per Lord Denman, Ch. J.

See cases on second sub. of II. Point.

(4.) An individual owning a bond of the United States for $1000, which is exempt from taxation, transfers it to one of these banking corporations, in payment for, and receives from the corporation, shares of its stock to the amount of $1000. The bond has become the property of the corporation; the immunity from taxation is in favor of its owner—the corporation. The individual has become the owner of a different kind of property, and cannot claim exemption on account of this bond.

(5.) Unless this be so, there will be double exemptions. A State corporation invests all its property in United States Bonds, and on this ground is exempted from all taxation on account of its property; and citizens who own the stock issued by this same corporation would also be exempted from taxation on account of their stock.

(6.) The shares of stock are property distinct from

the capital or property of the corporation. They entitle the owner of them to a portion of the gains and profits which the corporation may make and from time to time divide, and on its dissolution to a portion of the proceeds of its property after the payment of its debts.

(7.) The owner of shares of stock in one of these Banking corporations has no equitable interest in the bonds or other property owned by the corporation, different in *character* from that which the owner of the circulating notes, or other obligations made by the corporation, has. His equitable interest is secondary, and subordinate to that of the creditors of the corporation. Can it be successfully contended that a citizen whose property is all in the circulating notes of one of these Banks is not taxable on account of the same? It is submitted that the argument in favor of exempting him is stronger than it is in favor of the owners of shares of stock.

V. But if we are wrong in the preceding positions, the owners of shares of stock in these Banks are taxable on account of the same. The act of Congress, by virtue of which they exist, *subjects* the owners of shares of stock in them to taxation under State authority. The language of the act is, "Provided, that nothing in this act shall be construed to prevent *all* the shares in any of said associations, held by any person or body corporate, from being included

in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under State authority, at the place where such Bank is located, and not elsewhere; *Provided, further*, that the taxes so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the Banks organized under authority of the State where such association is located; *Provided, also*, that nothing in this act shall exempt the real estate of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

Act of June 3d, 1864, §§ 41 and 62, found in Statutes of U. S. of 1863–4, pp. 111 and 118

1. The obvious intent and meaning of the statute is to subject the owner of the shares of stock to taxation, under State authority, for the same, as a part of his personal property. This is manifest from the act of Congress itself, and also from the proceedings of Congress in reference to the bill and this provision.

   §§ 40 and 41 of the Act of Congress, Cong. Globe of 1863–4, part 2, pp. 1871, 1872, remarks of Senators Fessenden, Chandler and Pomeroy.

   Ibid, p. 1890, remarks of Senator Collamer.

   Ibid, part 3, p. 2639, remarks of Representatives Noble, Hooper and Ganson.

This is a clear declaration of the supreme legislative authority, that these shares of stock are to be taxable under State authority. Substantive affirmative provisions are frequently in statutes, and especially in acts of Congress, inserted in the form of provisos. Unless this is the true construction of the proviso in question, it is a nullity.

2. The act of Congress, the charter of these corporations, does and Congress thereby intended to subject the owners of the shares of stock to State taxation therefor, although a part or the whole of the capital of the Bank was invested in bonds issued by the United States.

(1.) This precise question was considered and discussed in Congress, and the proposition to exempt the shares to the extent that the capital of the Bank was invested in United States Bonds was rejected.

Cong. Globe of 1863–4, part 2, pp. 1871, 1872, 1873, remarks of Senators Chandler, Pomeroy and Fessenden.

Ibid, 1890, remarks of Senator Collamer.

Ibid, part 3, p. 2039, remarks of Representatives Noble, Hooper and Ganson.

3. Congress intended, and the act of Congress requires, that *at least* one-third of the capital of each of the Banks should be invested in United States Bonds. (*See act of* 1863, § 15; *act of* 1864, § 16.) Nevertheless, the act of Congress declares that *all the shares* in any of the said associations shall be taxable under State authority. (§ 41 *of the act of* 1864, *above set out.*) This, as well as the discussion in Congress above referred to, proves that the intent was, as the statute reads, that there should be no exemption to the shareholder, by reason of the fact that the capital of the Bank was invested in United States Bonds.

4. Congress, in authorizing the creation or continuance of these corporations, undoubtedly had power to prescribe the conditions on which the corporators should accept their charter; among which might be included their subjection to taxation under State authority on account of their shares of stock.

(1.) The corporation is the creature of the statute. It is precisely what the incorporating act has made it. It derives all its powers from the act, and has only the powers conferred, and is subject to all the burdens imposed upon it and its shareholders by the act of incorporation.

Head et al. vs. Prov. Ins. Co. 2 Cranch, 127.
Dart. College vs. Woodward, 4 Wheaton, 636.
Bank of Augusta vs. Earl, 13 Peters, 587.

(2.) These corporations and their shareholders, having accepted their charters containing a provision that the shareholders should be subject to taxation under State authority, while enjoying the franchises and privileges granted, cannot object to the conditions and burdens imposed.

(3.) The exemption claimed for these shareholders, both on account of the character of the corporation as an instrument of the Federal Government, and on account of the United States securities in which a part of the capital must, and all of it might, be invested, is for the benefit of the General Government. Clearly, if

Congress, in authorizing the creation of these corporations, deemed it ~~necessary~~ and proper to waive the exemption and leave the shareholders subject to taxation by the States, it had power to do so.

Opinion of Denio, Ch. J., pp. 15 and 16.

5. Congress regarded it as important to the success of the system of banking inaugurated by this statute, that the large amount of money which would be invested by citizens of the States, for private gain, in shares of the stock of the corporations authorized, should not be exempted from sharing State burdens.

See remarks of Senator Fessenden, Cong. Globe for 1863–4, part 2, p. 1872.

VI. There is no breach of good faith by Congress or the Federal Government in subjecting the *shares of Stock* in these corporations to taxation under State authority, although the entire amount of the capital of the corporation was required to be, and in fact is, invested in United States Bonds, which, before they were purchased by the corporation, were exempt from State taxation.

1. This is so for the reasons stated under the IV Point above. Neither the *bonds* nor the *owners* of the bonds

are taxed. It is the *owners* of *shares* of *stock in the corporation* authorized who are not to be exempted.

2. But aside from this view there is no breach of faith. When Congress authorized the creation of corporations and granted to them, when created, valuable franchises, it had a perfect right to make it a condition—a part of their charters—that the shares of stock in such corporations should be subject to taxation under State authority, no matter what might be the character of the securities in which the capital of the corporation should be invested.

3. Again, these bonds, while held and owned merely as evidences of debt against the Federal Government, are exempted from taxation. It would be a breach of good faith to take away the exemption, so long as the bonds are held and owned as mere evidences of indebtedness. But when the Federal Government says to the owners of these bonds: If *you elect* to accept corporate franchises and banking privileges, and make these bonds the basis of banking, we will grant you these franchises, privileges and rights, on condition that you waive the exemption which you now enjoy, and submit to State taxation: [redacted] there can be justly no pretence of bad faith on the part of the Government. The bad faith is on the part of these shareholders, who, while enjoying the privileges granted, seek to evade performance of one of the conditions imposed.

Cong. Globe for 1863–4, part 2, p. 1872, remarks of Senator Fessenden.

Ibid, p. 1890, remarks of Senator Collamer.

Ibid, part 3, p. 2199, remarks of Senator Collamer.

VII. The tax assessed upon Churchill, the defendant in error, was correct as to the place where it was assessed and as to the rate at which it was imposed.

1. No question was made in the Court below but what, if Churchill was taxable on account of his shares of stock, the place where he should be taxed was the First Ward of Utica.

(1.) When the assessment was made, in July, 1864, and the tax imposed in September of that year, (7 to 12,) he resided in the First Ward, in Utica, and the Bank was located in that Ward. (Fol. 7, sixth proposition.)

(2.) By the State law then in force, he should be assessed and taxed on his personal property in the ward where he resided. That law declares: "Every person shall be assessed in the town or ward where he resides when the assessment is made for all personal estate owned by him," &c.

New York Revised Statutes, vol. 1, p. 389, § 5, (1st Ed.;) vol. 1, p. 908, § 5, (5th Ed.)

The act of Congress declares that the shares of stock shall be taxed at the place where the Bank is located. (*See* § 41.) As to the PLACE, therefore, the taxation was in accordance with the State law and the act of Congress.

2. The shares of stock were assessed at their par value only. There is no complaint that they were not worth this amount. The assessment and taxation were at the same rate as upon other moneyed capital in the hands of citizens of the State. (7 to 12.)

§ 41 of Act of Congress.

3. If it be said that in the State of New York, shares of stock in State banks are not *taxed*, and therefore the assessment and taxation in question, are not in accordance with the act of Congress, (§ 41, second proviso,) we answer:

(1.) That there is nothing in this case, showing that the tax in question "exceeds the rate imposed upon the shares of any of the Banks organized under the authority of the State." To invalidate the tax on this ground, this fact should have been established. The presumption is, that the tax was imposed in strict accordance with law.

(2.) If we look to the statutes of New York, it will appear that the State Banks are taxed, in all cases, upon their capital at its par value, at least. (*Laws of N. Y. for* 1863, *p.* 435, *chap.* 240; *Tax Case*, 2 *Wallace*, 200.) The object of the proviso in question, was clearly to prevent a discrimination in favor of State Banks,

as against the National Banks. There is no such discrimination by the laws of New York. The State Banks are taxed to the amount of their capital.

(3.) The proviso in question is to have a reasonable construction. Its object was and is, to permit shares of stock in these Banks to be included at their value, and taxed at the same rate as other moneyed capital, and to prevent the State from selecting this property for, and discriminating against it in taxation.

Suppose there are no Banks organized under State authority, as will soon be the case, in that event cannot the shares of the National Banks be taxed, for the reason that there is no taxation of shares of stock in State Banks? Is this the proper construction of this statute? It is submitted, that in such a contingency the shares would be taxable. The first proviso of § 41 declares these shares shall be taxable, but not at a higher rate than other moneyed capital; this fixes the rate of taxation. The second proviso is only to prevent a discrimination in favor of State Banks.

VIII. The judgment below should be affirmed with costs.

FRANCIS KERNAN,

Counsel for the City of Utica, def't in error.

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

The CITY of UTICA
vs
G. CLARENCE CHURCHILL and OTHERS.

ADAM VAN ALLEN
vs.
MICHAEL A. NOLAN and OTHERS.

The BOARD of ASSESSORS of the CITY of ALBANY,
CHAUNCEY P. WILLIAMS and OTHERS
vs.
The SAME.

OPINION OF THE COURT.

Denio, C. J.—The appeals in these three cases were heard together, and the general question in each is, whether the shares of the stockholders in the banking associations created under the acts of Congress which provide for the creation of national banks, can be subjected to taxation by state authorities.

In the first case, the institution whose stockholders were taxed, was established on the 4th day of January, 1864, with a capital of $200,000, the whole of which was invested in the securities of the public debt of the

United States. The plaintiffs and other shareholders were taxed by the Common Council of the city of Utica, in September, 1864, for so much personal property as their respective shares in the stock of the bank represented.

In the second case, the institution is the First National Bank of Albany, which was established in February, 1864, with a capital of $300,000, the whole of which, and a considerable larger sum, is invested in similar national securities. Its shareholders, of whom the plaintiff is one, were assessed upon the respective amounts of their shares between the months of April and September, in the present year.

In the remaining case, the institution is the National Albany Exchange Bank; and it was established in January, 1865, with a capital of $300,000, all of which is invested in Federal securities. The plaintiff is a shareholder, and, with other shareholders, has been taxed during the present year in the same manner as in the other cases.

The defendants in these two actions are the individuals who constitute the Board of Assessors of the City of Albany.

Each of the three actions came before the Supreme Court, upon cases agreed upon, pursuant to section 372 of the Code of Procedure, for the purpose of determining whether the parties who had been assessed and taxed were legally liable to such taxation The plaintiffs proceeded in behalf of themselves and all other stockholders of their respective banks. In the first case the decision of the Supreme Court was, that the plaintiff Churchill was liable to the tax, his residence being in the First Ward of the City of Utica, in which ward the bank was located; and that the other plaintiffs were not liable, on account of their residence being without that ward. Judgment was given accordingly, and costs were awarded to the prevailing parties. In

the two other cases the taxes were adjudged to be illegal, and judgment was given in favor of the respective plaintiffs; and it directed that the names of the several stockholders be stricken from the assessment rolls. Appeals have been taken to this court by all the parties against whom the judgments were rendered.

The taxes in all the cases are challenged as illegal, on two principal grounds: First, that the banking institutions are creations of the Federal Government, and are instrumentalities provided by the National Legislature to execute the powers granted to it by the constitution; and, secondly, that the capital of these Banks, having been invested in securities of the public debt of the United States, which securities have been determined not to be liable to State taxation, the taxation of the shares is an act hostile to that immunity, and destructive of it, and that such taxation is consequently illegal and void.

As to the first position, it is incontestible that property wholly devoted to public uses by the general government cannot be subjected to the taxing power residing in the government of the several states of the union. Indepenntly of the cases which have been adjudged in the federal courts, it is perfectly plain upon principle, and it results inevitably from the system of the constitution that the national institutions and establishments of every kind, which have been brought into existence by laws constitutionally enacted by the national legislature, exist independently of the state governments, and cannot be made tributary by means of state laws for taxation, or in any other manner to the needs or exigencies of the state governments. This results necessarily from the preëminence which must always belong to an imperial government over the subordinate and local governments which are embraced within it, though these may be soverign in respect to all subjects not committed to the common sovereignty,

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which, within its assigned sphere, rightfully dominates over them all. This preëminence is, moreover, cautiously defined and guaranteed by the provision of the constitution, which declares that itself, and all the laws of the United States which shall be made in pursuance of it, shall be the supreme law of the land, and above and superior to all state constitutions and laws. Hence no man would for a moment claim that the taxing power of the state could be exerted against the public money in the treasury, the precious metals in the mint, or the lots, structures, ships, material of war, or other property devoted to public purposes by the general government. It was, no doubt, carrying this conservative principle to its extreme limit, to class the late bank of the United States among the instrumentalities for carrying on the government of the United States. That institution, although, for most purposes, it was concerned in the private business of the citizens of the United States, was yet charged with public duties of great importance. The government owned seven millions of its thirty-five millions of capital, and appointed five of its twenty-five directors; and it contributed one million and a half of its funds to the public resources. It was made subject to the visitation of the Secretary of the Treasury, and was bound to obey his orders, for transferring the public funds without charge for exchange, to all parts of the United States and the Federal Territories. (3 Story's Laws, p. 1547). These features of its charter enabled the Supreme Court of the United States to pronounce that it was an instrument necessary and proper for carrying into effect the powers vested in the government of the United States; and that it was of the same character, so far as the power of Congress to create it was concerned, as the public institutions, such as the mint, the post office, and the like. (McCullough vs. the state of Maryland, 4 Wheaton, p. 316; Osborn vs. The United States

Bank, 9 id., 738.) It followed inevitably from this determination that the United States Bank was no more subject to State taxation than any other of the great departments of the public administration. That this was the view taken by Chief Justice Marshall is apparent from the whole scope of his reasoning, in the masterly opinions prepared by him in the two cases to which I have referred; and it is pointedly manifested in the part which I will now quote from the opinion in the last of these two cases. Speaking of the argument of the counsel opposed to the bank, that the corporation was established for the management of an individual concern, and was founded upon contract, between individuals, and having private trade and private profit for its great end and principal object he said:

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business with its own views, would certainly be subject to the taxing power of the States as an individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true; the bank is not considered as a private corporation, whose principal object is individual trade and individual profit but as a public corporation, created for public and national purposes.

"That the mere business of banking is, in its nature, a private business, and may be carried on by individuals or companies, having no political connection with the government, is admitted; but the bank is not an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation."

But the Bank of the United States, equally with the banks involved in these cases, besides its public aspect as an instrument of the Federal Government was a

trading corporation. The citizens were not only permitted but invited to invest their moneys in its stock, for the purpose of their individual profit, and the community at large was expected to transact a large portion of its own pecuniary business by means of its agency. The faculty to transact that business and the contribution to its funds by its private stockholders are necessary in order to render it a useful instrument to the government in the transaction of its business. Without this connection with the general business of the country, it would be a mere inanimate body, useful, no doubt, to a certain extent, as a depository of the public moneys, but incapable of subserving the great public purpose for which it was created. Its connection with the general trade of the country, constituted, in the language of the Chief Justice, "Its vital spirit, which alone gave it a useful existence." But these individual means invested in the stock by the private stockholders were, before such investment, the proper and legitimate subjects of State taxation. There was certainly no reason why they should cease to be subjected to that liability after they were thus invested, unless such immunity was essentially necessary to the existence and preservation of the corporate body with which they were connected. It was argued that they were and are so necessary; that if the liability to taxation on the means so invested be sustained, it will be in the power of the state governments to tax them so inordinately as to wholly destroy them. The argument drawn from the possible abuse of a power clearly legitimate, except on account of such liability to abuse, is carried quite too far, and is not justified by the circumstances of the case or the common experience of mankind. The state taxes all the private property of its citizens invested, as it frequently is, in partnerships and associations, and in other business arrangements in connection with other individuals and corporations;

and yet it has never been considered that the power to tax was antagonistic to any of those other arrangements of business, which are tolerated and sometimes encouraged by the laws. There is, in truth, no practical repugnancy between the exercise of the power of taxation and the integrity of the institutions and business arrangements, in which the property so taxed is invested and mixed. A malicious exercise of the taxing power in such cases, might, no doubt, produce mischief or inconvenience, as might the gross abuse of any other of the powers reserved to the states; but so long as the property thus invested is only taxed in common and equally with other individual property, as is done in the taxing laws of this state, the apprehension of danger is purely fanciful It was the consideration of the mixed character of the purposes for which the bank of the United States was incorporated, and the two-fold character of its operations, and of the interests it was intended to promote, which led the Supreme Court of the United States, in determining the question of the liability of that institution to taxation, carefully to discriminate between the interests of the individual shareholders which represented their private investments in the stocks, and the corporate body itself. From the nature of the case, and the consideration that the judgment was to operate in every state in the Union in which the bank or its branches were located, or in which any of its stock might be held, it was eminently proper, and indeed essential, that the court should define the precise subject which should be exempt from the taxing power of the states, and that which should rsmain liable to contribute to the burden of sustaining the state institutions. We accordingly find at the close of the opinion of the Chief Justice, the following cautious qualification:

"This opinion does not deprive the States of any resources which they originally possessed. It does not

extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed upon the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State.

"But this is a tax on the operations of the bank; a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution.—Such a tax must be unconstitutional."—4 Wheaton, 436.

If this qualification was proper to be made in respect to the Bank of the United States, in which comparatively few of the citizens of the country were interested as stockholders, *a fortiori*, it is applicable to the national banks established by the recent legislation of Congress, which are designed to, and practically will supersede the State banks, and absorb the whole of the funds and property of all the people of the Union which shall be engaged in the business of corporate banking. The idea of withdrawing all these immense pecuniary means, constituting a very large proportion of all the personal property of the nation, from the duty of contributing to sustain the State governments, whose sphere it is to enact and administer all the laws and institutions which regulate the acquisition, enjoyment and transmission of property, and the administration of justice, and the conduct of State and local governments would be frightful to contemplate. We cannot yield to the argument that the qualification which the court annexed to its opinions, was a mere dictum of the Chief Justice, which we are at liberty to disregard. In the first place, it is in accordance with our own convictions of what is the necessary result of the principles upon which the court proceeded; but principally, we think we ought to adhere to it as a part of the judgment which the court was called upon to pronounce. The powers of the National and the State Governments were examined

and investigated to their very foundations, with a thoroughness which few other questions have ever undergone. A rule was to be adopted, with its necessary limits and qualifications, which was to be the guide of all the courts, State and National, and of all the people of the Union, for all time to come. That rule was adhered to during the whole period of the existence of the bank, and it is believed that it has been recognized as settled constitutional law, from the time the judgment was pronounced to the present day — a period of nearly half a century. We do not feel at liberty to depart from it in the judgments to be given in these cases. A provision in the act of Congress under which these banks were established, appears to us to lead directly to the same result. The clause in the act subjecting the shareholders in these banks to taxation, has a close reference to the qualification contained in the opinion of the Chief Justice, and was, no doubt, suggested by it; but as it is to be immediately examined in connection with the question next to be considered, we merely refer to it here. We close our observations on this topic by a reference to two cases in which the power to tax the shareholders in the bank of the United States under State authority has been affirmed (Bigelow *vs.* the city of Charleston, 1 Mott and McCord, 527. State *vs.* Collectors, 2 Bailey, 654). We conclude with entire confidence, that there is no impediment to the taxation of these shareholders, arising out of the consideration that banking corporations are not themselves taxable.

It remains to consider whether the circumstance that the national banks, whose stockholders are before us, had invested their capital in Federal stocks, exonerates them from State taxation. It is an essential prerequisite in the constitution of these banks, that before the commencement of their banking business, they shall own, and deposit with the Treasurer of the United

States an amount of the registered bonds of the public debt, to at least one-third of their respective capitals, and in no case less than the amount of thirty thousand dollars. (Laws 38th Cong., 1st Sess. ch. 106, sec. 16.) It must, therefore, be steadily kept in mind, in examining the other provisions of the act, that the Congress was creating and dealing with moneyed institutions, which must, according to the very law of their existence, possess at all times a large amount of these national securities, and which might own them in much larger proportions. The act of Congress to which reference has already been made contains provisions in the following words:

"Provided. That nothing in this act shall be construed to prevent all the shares of any of the said associations, held by any person or body, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by and under State authority, at the place where such bank is located and not elsewhere, nor at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this State: Provided further, that the tax so imposed under the laws of any State, upon the shares of the associations, authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located: Provided also, that nothing in this act shall exempt the real estate of associations from either State, county or municipal taxes to the same extent according to its value as other real estate is taxed." (Sec 41.)

It is not shown that any of the bonds held by these banks were actually issued by the government prior to the passage of the act above mentioned. The bonds contained, it is true, provisions on their face exempting them from State taxation; but this, I presume, did not add anything to the immunity in that respect which they enjoyed under the constitution as settled by the Federal judiciary. But if it should be considered otherwise, and that the taxing of the shareholders is,

in any proper sense, a taxing of the bonds, then as to all these which were issued subsequently to June 3, 1864, the lenders who received them must be considered as entering into the transaction with a knowledge of, and subject to the provisions of the public law, by which the exemption expressed upon their faee is qualified, including the aforesaid provision of the act passed on that day, which has just been mentioned: and thus considered, the terms of the exemption will be that they shall not be taxable under State authority, except that if they become parcel of the capital of a banking association, the shareholders shall nevertheless, be taxable on their shares, in common with other personal property of the citizen, with a limitation of the rate of taxation as mentioned in the proviso. I need not spend time to show that the fact that the exemption is expressed by the way of proviso, does not impair the force of enactment. It is in substance a declaration of the supreme legislative authority of the Union that the bonds may be taxed against the shareholders (if taxation of the shares is a taxing of the bonds) when they are made parcel of the capital of a national bank.

But we are of opinion that the assessment and taxation of the shares of a banking corporation is not a taxing of the property in which the capital of the bank has been invested. The shares of these banks are personal property. The stock is a species of chose in action, or an equitable interest which the shareholder possesses, and which he can enforce against the corporation. The shareholder is not the owner of the stock possessed by the corporation, any more than he is the owner of the discounted notes or other securities held by the bank. He is not the owner of either. He is only entitled to participate in the net profits earned by the bank; and upon its dissolution, to have his proper proportion of what may remain after payment

of its debts. A little reflection will show this to be so. Suppose the capital to be invested, partly in stocks and in part of other moneyed securities. As to the latter, there is no possible objection to the taxation. Now the assets of a bank are constantly fluctuating. A national bank must own the amount of the stocks required to be deposited with the Treasurer. As to any further amount, the bank may own it one day and part with it the next. If the shareholder is taxed on the footing of a part owner of the assets, a problem must be solved on each occasion on which the assessment is made to ascertain what aliquot proportion of the whole assets, deducting the debts, consists in this exempt stock, and the tax must be on the fractional part of each share; which would generally be a perfectly impracticable operation. A shareholder has, no doubt, a certain interest in all the property of the corporation. What I contend for is that it is not the interest of the owner of the property which the bank possesses. If any party, except the corporate body, has the interest of an owner, the creditors have such an interest. Neither they nor the stockholders can touch an item of the property. If there is anything which assimilates the interest of the creditors and shareholders to that of the owners, the creditors certainly approach nearest to that character, for they are first entitled to be paid; and in case of insolvency, the proceeds arising from the conversion of the assets are to be first applied to the payment of their demands. Now, when the constitutional inhibition, as construed by the courts, or the express provision contained in the laws provided for loans, speak of the bonds as not liable to State taxation, the meaning is that the owners of these bonds are thus exempt; not that all persons having a collateral interest in them are exempt. The expression is elliptical, but the idea of taxing a note or bond, distinct from its ownership by some person, naturally or artificial, is, of course,

an absurdity. The owner is taxed in respect to the bond, or on account of its ownership by him. If I am right in considering the banks as the owners of the bonds, and the shareholders as having a collateral interest respecting them, on account of their title to share in the profits, then it is the banking corporation, and not the shareholders, or creditors, which is entitled to claim the exemption. The Court of Kings Bench has, in a recent case, taken the same view respecting the ownership of the shareholders in the property of a corporation. The British acts of Parliament forbid the registry of a ship as a British vessel, unless it is wholly owned by British subjects. If a part owner is not a subject, it cannot be registered. A mandamus was sued out to compel the registry of a vessel owned by a British corporation, some of the shares in which were owned by foreigners.— The judgment was for the plaintiff, sustaining the right to a registry. Lord Denman said:

It appears to me that the British corporation is as such the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase or loss from its decrease; but in no legal sense are the individual members the owners. (The Queen *vs.* Arnoud, 9 Adolph & Ellis, N. S. 806).

I do not consider the case called the "Bank Tax Case, reported in 2 Wallace, 200, as at all hostile to the conclusion above expressed. This Court had held that the Bank of the Commonwealth was taxable, without regard to the amount it had invested in Federal stocks, under an act of the legislature of this state, passed in the year 1863, which declared that all banks, banking associations and other moneyed corporations and associations should be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, &c., in the manner provided by

law. We considered the tax thus provided for to be imposed on the corporation as a legal being, wholly irrespective of the securities in which its capital might be invested. We found that under a former system of tax laws, contained in the revised statutes, such had been repeatedly adjudged to be the rule; and that if the bank had lost a part of its capital, or had added to its assets by an accumulation of profits, it did not in any manner affect the amount for which it was taxable. (The Bank of Utica *vs.* The City of Utica, 4th Paige, 399: The People *vs.* The Board of Supervisors of Niagara county, 4th Hill, 203; The Farmers' Loan and Trust Company *vs.* The Mayor, &c., 7th Hill, 261; The Oswego Starch Factory *vs.* Dolloway, 21 N. Y., 449). This was a point, as will be seen by these cases, well settled in this state. The point thus adjudged we understand to be concurred in by the Supreme Court of the United States, or at least by the eminent judge who prepared the opinion of the court in the case reported in Wallace, in his opinion in the former case of the Bank of Commerce *vs.* New York City, reported in 2 Black, 620. He there said that according to the former system of taxation — meaning that which was contained in the Revised Statutes — banks were taxed on their nominal capital, without regard to loss or depreciation. According to that system of taxation, he said it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax, he added, was like one annexed to the franchise as a royalty for the grant. We were of opinion that the intention of the act of 1863 was to return to that system, and, if we had been correct in that assumption, it certainly would have followed that it was immaterial whether the capital was invested in United States bonds or any other securities. The determination in the *Bank Tax Case*, by which our judgment was reversed, proceeded

upon the ground that we had misconstrued the act of 1863, and that it was not a tax on banks nominally which was intended, but was a tax upon their property and assets, valued by an artificial standard. If our act of 1863 had declared the tax to be imposed upon the amount of the nominal capital, irrespective of the mode of its investment, when the tax came to be assessed, we suppose our judgment would have been affirmed instead of being reversed.

It is argued that congress had not the constitutional power to enact the provisions contained in the bank act of 1864. The argument is that as the constitution had exempted public stocks from taxation by the states, it was not in the power of congress to subject them to such taxation. It is material to remember that there is no language of the constitution to that effect. But the Supreme Court has considered that the exertion of the taxing power of the states upon these securities would or might impair the ability of the government to raise by loan for public purposes, and hence would be hostile to the congressional power to borrow money, and it was easy to see that the faculty of borrowing upon securities which should enjoy that immunity, might in some degree promote the negotiation of loans. But is this an advantage which may not be waived by the national legislature? There are frequently other public objects connected with a loan beyond the mere purpose of realizing the amount required to be borrowed. One purpose of the government, organized by the constitution, is declared to be to promote the general welfare of the people of the United States. No doubt the maintenance of the state governments to which the possession of pecuniary means to be acquired by taxation is essential, is intimately connected with the general well being of the people. Suppose, then, that congress should come to the conclusion that the placing of the general government in respect to a loan upon the same

footing with other borrowers, would not essentially affect the ability to negotiate such loans, while it would greatly conduce to sustain and promote the interest of the state governments in their pecuniary arrangements, and would, moreover, more effectually secure domestic tranquility, which is another object aimed at by the constitution, is the Supreme Legislature powerless in the premises? I cannot believe that such is the case. The inhibition of the States to tax the money of their citizens invested in national loans is predicated of the power to borrow money on the credit of the United States. It is a power conferred in the same general terms as the power to regulate commerce; and it has frequently been decided in the Supreme Court of the United States, and in this court, that an act of a State Legislature, having the effect of a commercial regulation, is not a violation of the constitution, if congress has not exercised undoubted authority over the subject in that particular case (Wilson *vs.* The Black Bird Creek Swamp Company, 2d Peters, 250; Sturges *vs.* Crowningshield, 4th Wheaton, 193; Moore *vs.* Houston, 5th *id.*, 1; Cooley *vs.* The Board of Wardens, Philadelphia, 12th How., 299; Lemon *vs.* The People, 20 N. Y., 562, 613). If by omitting to legislate on the subject the States are left free to act, *a fortiori*, an express permission to the States to act would not be objectionable. In the pilot case above referred to, from 12 Howard Reports, the state of Pennsylvania had passed an act for the regulation of pilots. It was shown in the opinion in the case that this State law was in substance, a regulation of commerce. Congress had never assumed to enact a pilot system; but the maritime states had generally done so, and Congress had at an early day, passed an act declaring that pilots should continue to be regulated "by such State laws as they may respectively hereafter enact for that purpose." The pilot act of Pennsylvania was declared to be valid on the general

ground that Congress could waive in favor of the states the right which the constitution had conferred upon it, by the power to regulate commerce. I consider this a strong precedent for holding that the National Legislature is competent to waive the right which, under the decision of the Federal Courts, it possesses, to provide for the negotiation of loans which shall not clothe their securities with an exemption from state taxation. If, therefore, it could be held that the taxation of these shares was the taxing of the bonds which the corporations hold, I should yet think that the taxation was lawful under the permission contained in the Banking Law of the United States.

It is further urged, that these shareholders are taxed beyond the limits prescribed in the proviso in the act of Congress. We do not perceive that to be so. The stock is assessed at the amount represented by the shares respectively. It is not shown that they are not of that value. Then the tax is at the same rate per cent. as other moneyed capital in the hands of individual citizens. Our laws do not authorize the taxation of shares in the banks organized under the authority of the State. We tax our domestic banks on their capital, pursuant to the act of 1863, and it is presumed that the taxing officers conform to the judgment in the bank tax case, reported in 2 Wallace, by deducting the part invested in United States bonds. This exemption is made because the banks which are taxed are the owners of these bonds. But we have shown that the shareholders are not the owners of the bonds held by the banks.

There are some questions which are not common to all these cases. In the first case the bank was established, and the taxes which are challenged, were imposed prior to the enabling statute of this state, which passed and became a law on the 9th day of March, 1865. Only one of the plaintiffs resided in the ward of

the city of Utica in which the bank is situated. The principles which have thus far been stated show that he was legally taxed. Of the other parties taxed, one resided in another ward of the city, one in the same county, another in another county of this state, and the remaining one in the District of Columbia. Prior to the Enabling Act, our laws required that the taxation of personal property should be in the town or ward in which the taxpayer resides. I was at first inclined to the opinion that the provision of the National Banking Law, so often referred to, might be considered as a change of our own laws, and might be sustained on account of its relation to the National Banks which are within the sphere of Federal legislation. On further reflection, I have concluded that it would be more correct to hold that the effect of the proviso is to permit the States so to shape their laws of taxation so as to tax all the shareholders at the place where the bank is situated, as has been done by the enabling act. It follows that the judgment of the Supreme Court in favor of the plaintiff against Mr, Churchill should be affirmed; and that the judgment in favor of the other defendants in that case, should likewise be affirmed.

In the second case the bank was established prior to the passage of the enabling act just mentioned, and also prior to the banking act of Congress, approved June 3, 1864. The enabling act, which authorizes the taxation of shareholders otherwise than in the place of their residence, declares that "all the shares of any of the banking associations organized under this act or the act of Congress mentioned in section one of this act," shall be assessed or taxed in the town or ward in which the bank is located. (Laws of 1865, chapter 95, section 10.) And the act of Congress mentioned in that first section is the act of June 3, 1864. The first national banking act, passed Feb. 25, 1863. (Thirty-

seventh Congress, 3d chapter, 48.) And it was consequently under that act that the First National Bank of Albany was organized. This would be conclusive in favor of such of the shareholders of that institution as reside out of the proper ward of the bank, were it not that a section of the act of 1864 (the 62) provides that all the banking associations organized under that former banking act, which is in terms repealed by that section, should enjoy all the rights and privileges granted, and be subject to all the duties, liabilities and restrictions imposed by that act of 1864. I am of opinion that when the enabling act embraced within its scope, all the associations organized under the act of 1864, it included, by a reasonable construction these associations, which although first established under the earlier act, were continued and confirmed by the banking act of 1864, and which stood at the passage of the New York act, solely upon the last mentioned banking act of the United States. Hence, the judgment in the second and third of the above entitled cases must be reversed; and it must be declared as the judgment of this court that the taxation of the shareholders mentioned in the cases agreed on in these actions were legal and valid.

The costs in each of the appeals are awarded in favor of the prevailing parties. The form of the judgment is to be settled by one of the Judges, unless agreed on by the parties, in order that a proper clause may be inserted, showing that a question arising under the constitution of the United States, was involved in the decision.

All the Judges concurred in these conclusions, except that Porter, J., did not sit in the last mentioned case, on acount of interest in the bank concerned in it.